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No.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

LONG BEACH EQUITIES, INC.,
Petitioner,
vs.
COUNTY OF VENTURA, CALIFORNIA, and CITY OF SIMI VALLEY, CALIFORNIA,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION SIX

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents questions which are related to, but in a broader context than, those already accepted for review in *Lucas v. South Carolina Coastal Council, cert. granted*, no. 91-453, *PFZ Properties, Inc. v. Rodriguez, cert. granted*, no. 91-122, and *Yee v. City of Escondido, cert. granted*, no. 90-1947.

1. Where land use regulations, adopted for an otherwise proper municipal purpose, leave the owner of 250 acres of vacant land purchased for residential development with no economically viable use and no way to realize distinct, investment-backed, profit expectations, has a taking occurred which requires compensation under the Fifth and Fourteenth Amendments to the U.S. Constitution?

2. Where local government agencies have made it clear that development of vacant land will not be permitted during at least the next decade, making it impossible for the current owner of the property to have any chance even to recoup its investment because the costs of carrying the vacant land for that long would be prohibitive, is the dispute "ripe" for litigation?

3. When the reasons proffered by a municipality for preventing the use of land are devoid of factual support, has the landowner been denied substantive due process of law?

PARTIES TO THE PROCEEDING

The parties are listed in the caption. In trial court proceedings, Marr Ranch Associates, owner of neighboring property, was also a plaintiff.

RULE 29.1 STATEMENT

Long Beach Equities, Inc. is a wholly owned subsidiary of Long Beach Service Corporation, a holding company of Long Beach Bank, a state savings bank.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that a Writ of Certiorari issue to review a judgment and order of the California Court of Appeal, Second Appellate District, Division Six.

OPINIONS BELOW

The California Court of Appeal issued its first (unpublished) opinion on March 15, 1991. (App. A) After granting a rehearing (App. B), the Court of Appeal issued a different opinion on June 27, 1991. (App. C) That opinion was then modified on July 25, 1991. (App. D) The final opinion was published at 231 Cal. App. 3d 1016. The California Supreme Court denied review by an unpublished order on September 26, 1991. (App. E) The trial court orders reviewed on appeal are unpublished and appear in Appendix F.

JURISDICTION

This case involves a regulatory taking of 250 acres of undeveloped land suitable for single family residential development which the Respondent County and City have prevented from being used for any viable purpose.

The Petitioner (LBE) sought relief under the Fifth and Fourteenth Amendments to the U.S. Constitution from the California Superior Court because the governmental action had taken their property without compensation, deprived them of property without due process of law, and denied them equal protection of the laws. The federal questions were thus raised at the earliest opportunity and were briefed and argued in all California courts.

The Superior Court dismissed the case against the County, but permitted the case against the City to proceed. (App. F) The Court of Appeal, however, ordered both cases dismissed.

(App. C) The timely Petition for Review was denied by the California Supreme Court on September 26, 1991. (App. E)

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment, United States Constitution:

> ". . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

> "Section 1. . . . nor shall any State deprive any person of life, liberty, or property without due process of law; . . ."

Pertinent provisions of County and City ordinances are noted in Appendix C.

STATEMENT OF THE CASE

In 1984, LBE purchased a 250 acre parcel of the 2,800 acre Marr Ranch in an unincorporated part of Ventura County, California, near the City of Simi Valley. That purchase was made only after both the County and the City assured LBE that both entities believed that the property was uniquely suited for immediate residential development. Both General Plans provided for 1730 homes on the entire Marr Ranch, with 1100 of them on LBE's property. (CT [Clerk's Transcript on appeal] 139, 146, 761, 771-72, 775)

Based on those representations, LBE purchased the property and began working with the City (as required by the County, which anticipated the property would be annexed by the City) to achieve development. At the City's request, LBE prepared a Specific Plan for the entire Marr Ranch (10 times LBE's acreage) and paid for an EIR for development of

the entire Ranch. The City became the applicant for the Specific Plan. While the Specific Plan was being processed, and at the City's encouragement and request, LBE paid to have infrustructure being installed in neighboring developments built to a sufficient capacity to serve 1100 Marr Ranch homes. When the City modified its grading ordinance, LBE modified the Specific Plan and proposed a General Plan amendment to reduce the units on the Marr Ranch property from 1730 to 1059. (CT 144-47, 765, 767-68 771-72)

Then, abruptly, the City imposed a moratorium on processing all new projects and stopped processing the Specific Plan for this property. Thereafter, the City revised its General Plan, reducing the desired number of homes to 325. LBE again changed course in response to the City's desires and prepared a plan for 249 homes. But the City won't process that application until LBE prepares a new Specific Plan for the entire 2800 acre area, not just its own 250 acre tract. (CT 147-48, 776-77)

City employees told the County Board of Suprervisors that it would take 8 to 10 years for LBE to complete the Specific Plan/EIR process now demanded, and then obtain project approval, and then seek some of the few building permit allocations now permitted under the City's "slow growth" ordinance. (CT 149, 777-78)

Meanwhile the County — in whose jurisdiction the property was and remains — has refused to permit development. While LBE was attempting to deal with the City (as the County insisted), the County rescinded the applicable part of its General Plan, imposed an "urban reserve overlay" (meaning that the property was available only for urban development), and downzoned the property so drastically that only 1 home can be built on it. When LBE sought to process a rational, 249 home project through the County, the County refused even to provide LBE with an application form, although it had processed similar applications from

other landowners who were legally indistinguishable. (CT 153-54, 784)[1]

Frustrated by the administrative run-around described above, and having been told by the County that it would have to seek justice somewhere other than from the County (CT 155, 786), LBE filed suit to vindicate its Constitutional rights. (CT 1)

REASONS FOR GRANTING THE WRIT

INTRODUCTION

Many people believed that, with the decisions this Court issued in 1987,[2] much of the lower court confusion surrounding issues of regulatory taking would disappear. For, in its 1987 decisions, this Court supplied substantially more guidance to lower courts than they had possessed before.

Important questions were left unanswered, however, and commentators from all points of the spectrum have observed the significance of the issues remaining undecided. State courts remain frustrated, as this comment by the Supreme Court of Washington attests:

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[1] Additional facts are discussed as appropriate in this Petition. Please note that the City and the County — individually and jointly — have prevented LBE from using its land. The separate actions of these 2 entities are important. One of the problems with the Court of Appeal's opinion is that it tends to treat both entities as part of a single development process. They are not. Each is responsible for its own actions. Each bears individual responsibility here.

[2] Including *First English Evangelical Lutheran Church v. County of Los Angeles* (1987) 482 U.S. 304; *Nollan v. California Coastal Commn.* (1987) 483 U.S. 825; *Keystone Bituminous Coal Assn. v. DeBenedictis* (1987) 480 U.S. 470; and *Hodel v. Irving* (1987) 481 U.S. 704.

> "Despite these attempts [i.e., *First English, Nollan,* and *Keystone*], the definitive answers, so *necessary* for state courts to make reasoned determinations concerning minimum federal due process requirements, remain *unavailable.* Our task is *complicated* further by the *ambiguities* contained in recent Supreme Court decisions and by the fact that despite a 3-month separation, recent cases do not cite each other. As Justice Stevens observed, '[e]ven the wisest lawyers would have to acknowledge *great uncertainty* about the scope of [federal regulatory] takings jurisprudence.' " (*Orion Corp. v. State* [1987] 109 Wash. 2d 621, 653; emphasis added.)

The lower courts have been unable to arrive at any coherence. Much of the confusion which existed before 1987 continues now, nearly half a decade later.[3]

Thus, in spite of this Court's earlier efforts to clarify the law, it remains possible to find regulatory taking decisions to support virtually any point of view one wishes to espouse.

Guidance from this Court is made all the more necessary because the core issue in these cases is the meaning of the 5th Amendment. The interpretation and application of that Amendment's protection should not be made to depend on the State in which a property owner happens to own land. However, because this Court has held that litigation cannot be considered by the federal judiciary until *after* the state courts have decided whether compensation for a taking will be made under state law (*Williamson County Reg. Plan. Commn. v. Hamilton Bank* [1985] 473 U.S. 172), state courts

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[3] Illustrative is the litigation which has continued to rage in California, notwithstanding that this Court pointedly told the California judiciary that it was not affording to property owners the protections guaranteed by the 5th Amendment's Just Compensation Clause (*First English*, 482 U.S. at 311; *Nollan*, 483 U.S. at 839).

will continue to be the usual locus of decisionmaking in these cases. It is thus imperative that those 50 local jurisdictions have clear guidelines to follow in applying protection which derives from the U.S. Constitution and which will ultimately be measured by adherance to that organic charter.

This case presents the opportunity to end major elements of uncertainty still facing lower courts. Issues which appear in most of the cases now being litigated are before the Court in this Petition:

- the extent to which a property owner's "distinct, investment-backed profit expectations" are protected by the Just Compensation Clause against regulatory interference;
- the nature of the allegations which a property owner needs to plead to establish a *prima facie* case of either regulatory taking or substantive due process denial; and
- the scope, meaning, and elements of the requirement that a regulatory taking be "ripe" before it is eligible for judicial review.

Lower state and Federal courts are in acute disharmony on how to decide these issues, thus increasing the confusion among property owners and regulators about their respective duties and responsibilities. Litigation abounds, without resolution on the merits and with contradictory results. Professor Williams put it pungently, but accurately, in his nationally recognized text:

> "If there are no rules specific enough to control future decisions, then every case is decided according to the *gastronomic school of jurisprudence*; that is, this is an area where government acts according to *gut feeling* in the individual case, instead of by rule of law." (1 N. Williams, *American Land Planning Law* [rev. ed. 1988] 136; emphasis added.)

The situation in the lower courts is as chaotic as one would expect from a "gastronomic school of jurisprudence" operating on "gut feeling in the individual case instead of by rule of law." Lack of "ripeness," for example, is now raised as a defense in virtually every regulatory taking case. As happened here, prodigous time, effort, and money are expended in a chimerical effort to determine whether the case is "ripe" enough for the court to examine the merits, even though all parties know the reality that their positions have hardened to the point of presenting a concrete controversy. Because the outlines of "ripeness" have no more than Will-o'-the-wisp substance, treatment of the issue is not consistent from State to State or Circuit to Circuit.

This case presents the opportunity for this Court to explain in a comprehensive way how the concepts of "ripeness," investment-backed expectations, substantive due process, and the guarantee of the Just Compensation Clause are supposed to function in the land development context. Such guidance would be a blessing to all concerned who, at present, are compelled to litigate cases to the last available court in order to find an answer. It becomes essential when the question would be answered differently on the same facts in a different jurisdiction. At a minimum, this Court's explication would lessen the burden on the judiciary by letting the participants in the land use process know precisely what needs to be done before the attention of the judiciary is available, and what sorts of controversies are entitled to be litigated at all.

I. THERE IS NO COHERENT RULE APPLIED IN THE LOWER COURTS GOVERNING WHAT IT TAKES TO ESTABLISH A REGULATORY TAKING

In its recent regulatory taking cases, this Court has indicated that a taking occurs if a regulation deprives a

property owner of "economically viable use" of his land,[4] and that a property owner's "reasonable, investment-backed, profit expectations" are protected against confiscation by state and local government land use regulations.[5] The problem is that this Court has neither defined these terms nor given guidance to lower courts in determining their meaning. As the 1980's began, a noted commentator lamented:

> "In 1978, the Supreme Court, after 91 years of producing nearly all the leading police power taking decisions, essentially gave up. Viewing the facts of *Penn Central* . . . as presenting a question of police power takings, the Supreme Court announced that there was no 'set formula' to resolve the question. Rather, said the Court, different fact patterns require different approaches for solution." (Stoebuck, *Police Power, Takings, and Due Process*, 37 Wash. & Lee L. Rev. 1057, 1068 [1980]).

Things haven't changed much, as a more recent survey concluded:

> "[T]his area of the law *has not been clarified* and the courts continue to generate *contradictory opinions* utilizing various aspects of the extant 'formulas,' none of which have garnered anything approaching a consensus in the view of bench, bar, and academe." (*1988 Zoning and Planning Law Handbook* 342 [Gordon, ed., 1988]; emphasis added.)

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[4] E.g., *Agins v. City of Tiburon* (1980) 447 U.S. 255, 260; *United States v. Riverside Bayview Homes, Inc.* (1985) 474 U.S. 121, 126; *Keystone Bituminous Coal Assn. v. DeBenedictis* (1987) 480 U.S. 470, 485.

[5] E.g., *Williamson County Reg. Plan. Commn. v. Hamilton Bank* (1985) 473 U.S. 172; *Penn Central Transp. Co. v. City of New York* (1978) 438 U.S. 104.

Thus, lower courts have generally sought to determine these issues by doing what judges and lawyers are most comfortable doing: examining the diminutions in value in earlier cases which were held not to constitute a taking.[6]

That creates another problem: the older cases were decided *before* this Court announced either the concept of "economically viable use" or the concept of "reasonable, investment-backed, profit expectations,"[7] not to mention the rules announced or emphasized in *First English Evangelical Lutheran Church v. County of Los Angeles* (1987) 482 U.S. 304 and *Nollan v. California Coastal Commn.* (1987) 483 U.S. 825. Moreover, the decisions of this Court which appear in this earlier group were either decided at a significantly earlier and less complicated time in land economics and land use control sophistication, or were decided in the context of pleadings or proof which did not present the issue of whether the questioned regulation was confiscatory.

Clarification in the context of today's realities is not only warranted, it is sorely needed by all participants in the process.

A. There is Confusion in the Lower Courts About the Meaning of "Economically Viable Use" of Property

Twelve times in the last decade or so, this Court has noted that, if a regulation deprives a property owner of the

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[6] E.g., *Village of Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365; *Hadacheck v. Sebastian* (1915) 239 U.S. 394; *William C. Haas Co. v. City of San Francisco* (9th Cir. 1979) 605 F.2d 1117.

[7] Neither concept appears in land use cases in any court before this Court's decision in *Penn Central Transp. Co. v. City of New York* (1978) 438 U.S. 104, in which they were first enunciated.

"economically viable use" of his property, a taking has occurred.[8]

However, in *none* of those cases did the Court explain how to determine economic viability. The phrase was simply stated and then lower courts were left to shift for themselves. Lower courts have developed no consistent, or even predictable, definition.

Commentators are in accord that chaos is the rule. The following is typical:

> "This virtually *standardless* inquiry has provided *little predictability* for property owners, nor has it served as a reliable guide for government action." (Lawrence, *Regulatory Takings: Beyond the Balancing Test* [1988] 20 The Urban Lawyer 389, 400; emphasis added.)[9]

As the 9th Circuit put it, ". . . the precise meaning of 'economically viable use' of land is elusive and has not been clarified by the Supreme Court." (*Lake Nacimiento Ranch Co. v. San Luis Obispo County* [9th Cir 1987] 841 F.2d 872,

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[8] *Kirby Forest Indus., Inc. v. United States* (1984) 467 U.S. 1, 14; *Agins v. City of Tiburon* (1980) 447 U.S. 255, 260; *Penn Central Transp. Co. v. City of New York* (1978) 438 U.S. 104, 124; *Kaiser Aetna v. United States* (1979) 444 U.S. 164, 174 n. 8; *San Diego Gas & Elec. Co. v. City of San Diego* (1981) 450 U.S. 621, 653 (dissenting opinion); *MacDonald, Sommer & Frates v. County of Yolo* (1986) 477 U.S. 340; *Nollan v. California Coastal Commn.* (1987) 483 U.S. 825; *Keystone Bituminous Coal Assn. v. DeBenidictis* (1987) 480 US 470; *United States v. Riverside Bayview Homes* (1985) 474 U.S. 121; *Williamson County Regional Planning Commn. v. Hamilton Bank* (1985) 473 U.S. 172; *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.* (1981) 452 U.S. 264; *Schad v. Borough of Mount Ephraim* (1981) 452 U.S. 61.

[9] For similar assessments, see, e.g., *1988 Zoning and Planning Law Handbook* 14, 342 (Gordon, Ed., 1988); 1 Williams, *American Land Planning Law* [1988 Cum. Supp.] 53.

877) In that case, the absence of standards permitted the court to ignore testimony that each of the supposedly permitted uses of land had no evonomic value to the property owner.

Here, while acknowledging the "elusive" nature of the concept of economic viability (App. C, p 19), and acknowledging that the County zoned the property so as to permit one home on each 160 acres of land (App. C, p 22), the court below concluded that no taking occurred. Aside from the erroneous assertion by the court that LBE could have sought rezoning to 10 acre parcels (App. C, p 23),[10] the possibility and value of available uses is a question of *fact*, which cannot be decided on the pleadings.

The confusion extant in the law permits this sort of result. Clarity from this Court would be reflected in clarity and consistency below.

B. There is Conflict Among Lower Courts About Whether Trial of the Facts is Required to Find That a Regulation "Substantially Advances a Legitimate State Interest" or Whether that Finding can be Made as a Matter of Law

As an alternative, the cases cited above hold that a taking occurs when a land use regulation fails to substantially advance a legitimate state interest. There is, however, no lower court agreement on how to make this determination.

The conflict on this issue is starkly apparent when the California Court of Appeal opinion in this case is set beside the nearly contemporaneous decision of the 9th Circuit Court

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[10] It could not. The County refused to process any such applications.

of Appeals in *McDougal v. County of Imperial* (9th Cir. 1991) 942 F.2d 668.

In the case at bench, LBE attacked the County and City ordinances for, among other things, being unnecessary to accomplish their stated goals of ensuring that sufficient facilities were available to support additional housing. The reason for that was that LBE had already seen to it that adequate infrastructure was available for far more than the number of homes it sought to build. Thus, LBE sought a trial at which it would prove that the ordinances being used to prevent development of its property failed to substantially advance a legitimate state interest because infrastructure already existed to support this development.

The California Court of Appeal refused to permit trial. Rather, it concluded *as a matter of law, without any evidence*, that the governmental prohibitions were necessary. Rather than examining evidence, the California court dealt in sweeping generalities like this:

> "Local government legislation is constitutional on its face if it bears 'a substantial relationship to the public welfare . . .' and inflicts no irreparable injury on the landowner. [Citation.] . . .
>
> "Both County's Guidelines and City's Growth Management Ordinance satisfy this test. The County enacted the Guidelines to promote efficient and effective delivery of community services and to conserve the resources of County by encouraging urban development to occur wihin cities. The Guidelines emphasize annexation as a means to accomplish these purposes." (App. C, p 11)

In sharp contrast, the 9th Circuit's *McDougal* opinion holds that such decisions must be based on a critical examination of evidence and cannot be made as a matter of law on a motion to dismiss (the functional equivalent of the demurrer rulings in this state court proceeding):

"The district court held that the McDougals 'failed to establish that the County's actions do not substantially advance a legitimate state interest.' However, they have no obligation to 'establish' the illegitimacy of the County's motivations on a motion to dismiss. Likewise, the McDougals allege that the requirements for a conditional use permit and a verified ground water model were impossible to satisfy and did not relate to legitimate concerns of the County, but the district court's order gives no consideration to these charges.

"The legitimacy of the public interest involved, how much it is furthered by the regulatory actions at issue, the extent of the public benefit obtained or expected, and the degree that the McDougals' property rights and reasonable investment-backed expectations have been impaired are all factors which lie at the heart of the takings inquiry. *These things typically cannot be assessed properly without a factual inquiry.* [Citation.]" (942 F.2d at 679-680; emphasis added.)

The decision in the case at bench and *McDougal* CANNOT both be correct. Either a factual inquiry is needed or the issue is one of law. This stark conflict is endemic to this field of the law. Anarchy will continue to reign, with courts randomly choosing whichever approach will best serve their desires of the moment, until this Court ends the conflict and confusion.

C. There is Confusion in the Lower Courts About What This Court Meant by "Reasonable, Investment-Backed, Profit Expectations"

Sixteen times in the last decade or so, this Court has noted that the question of whether a regulation effects a taking of private property for public use must be analyzed in terms of the impact of the regulation on the property owner's "reasonable [or distinct] investment-backed expectations."[11] In three of those decisions which involved land use regulations, this Court considered the concept of profit or reasonable return on investment.[12]

However, in *none* of those cases, did this Court explain *how* the impact on a property owner's profit expectations was to be considered. It was simply said, and then left unelaborated. As a result, lower courts — as well as all participants in the land use process — have little guidance. While they have been told that the expectation must be more

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[11] *Penn Central Transp. Co. v. City of New York* (1978) 438 U.S. 104; *Andrus v. Allard* (1979) 444 U.S. 51; *Kaiser Aetna v. United States* (1979) 444 U.S. 164; *PruneYard Shopping Center v. Robins* (1980) 447 U.S. 74; *Hodel v. Virginia Surface Min. & Recl. Assn.* (1981) 452 U.S. 264; *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419; *Kirby Forest Indus., Inc. v. United States* (1984) 467 U.S. 1; *Ruckelshaus v. Monsanto Co.* (1984) 467 U.S. 986; *United States v. Locke* (1985) 471 U.S. 84; *Williamson County Reg. Plan. Commn. v. Hamilton Bank* (1985) 473 U.S. 172; *United States v. Riverside Bayview Homes, Inc.* (1985) 474 U.S. 121; *Connolly v. Pension Benefit Guaranty Corp.* (1986) 475 U.S. 211; *MacDonald, Sommer & Frates v. County of Yolo* (1986) 477 U.S. 340; *Keystone Bituminous Coal Assn. v. DeBenedictis* (1987) 480 U.S. 470; *Hodel v. Irving* (1987) 481 U.S. 704; *Nollan v. California Coastal Commn.* (1987) 483 U.S. 825.

[12] *Penn Central*, 438 U.S. at 136; *Williamson County*, 473 U.S. at 200; *Keystone*, 480 U.S. at 496, 501.

than a ". . . unilateral expectation or an abstract need . . ." (*Ruckelshaus v. Monsanto Co.* [1984] 467 U.S. 986, 1005) and that the concept has its basis in ideas of ". . . justice and fairness . . ." (*Kirby Forest Indus., Inc. v. United States* [1984] 467 U.S. 1, 14), this Court has given little more.

The Court has not yet taken the opportunity either to reconcile its general formulation of "reasonable, investment-backed expectations" with earlier cases emanating either from the Court itself or from influential lower courts or to overrule any of the earlier cases. It is time for the Court to let the citizens of this country know whether it is serious about its protection against regulatory takings and, if so, how that protection is to be achieved.

For example, in *Village of Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365, the regulation diminished the value of the property by 75%. In *Hadacheck v. Sebastian* (1915) 239 U.S. 394, the regulation diminished the value of the property by 88%. And in what may be the most eggregious example, the regulation in *William C. Haas Co. v. City of San Francisco* (9th Cir. 1979) 605 F.2d 1117, diminished the value of the property by 95%. No taking was found in any of these cases. Both *Euclid* and *Hadacheck* were decided before this Court's series of cases during the last decade introduced the "expectations" test. *Haas* never discusses the test. Nonetheless, each of the older cases is now cited by lower courts to demonstrate that regulations far more onerous than the one being litigated have been upheld. (See, e.g., App. C, pp 19-22, 25.)

But can these earlier cases be so routinely relied on to determine if there has been a taking? What light is shed on the older cases' validity by the more recent decisions of this Court? *Can* the older cases continue to be uncritically used as benchmarks for how far regulation may diminish property without compensation? How does leaving the property owner with 5% of the value of his land (or 12%, or even 25%) comport with "reasonable, investment-backed, profit

expectations" or "economically viable use?" When that question is posed to a lay audience, the universal response is either groans or nervous laughter.

As a consequence, commentators agree that there is no standard which the lower courts believe they can apply. The result is total unpredictability:

> " 'Investment Backed Expectations.' This is another phrase which has recently been adopted and repeated widely. Again, it is *difficult to know what to make of it* . . . The state *courts have struggled* for a long time over the same question . . . Close analysis of these cases indicates that there is *no consensus* in the vast body of state law on this point; it is an area of almost *pure gut jurisprudence.*" (1 Williams, *American Land Planning Law* [1988 Cum. Supp.] 54-55; emphasis added.)[13]

Neither regulators nor property owners are able to predict with any degree of confidence the outcome in a specific case. Thus, numerous cases are litigated which might otherwise be resolved short of the courthouse. Fundamental Constitutional protections deserve more identifiable road signs than that.

Notwithstanding this Court's repeated employment of the "profit expectations" concept, however, lower courts are in conflict on whether even to accept the notion of profitability as a factor to consider in determining whether a taking has occurred. The Second Circuit and the Ninth Circuit have flagrantly flaunted their rejection of the idea,[14] while the

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[13] For similar reactions, see, e.g., Mandelker, *Investment-Backed Expectations: Is There a Taking?* (1987) 31 J. Urb. & Contemp. L. 3; Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches* (1988) 39 Hast. L. J. 335, 345.

[14] E.g., *Park Avenue Tower Associates v. City of New York* (2d Cir. 1984) 746 F.2d 135; *William C. Haas Co. v. City of San Francisco* (9th Cir. 1979) 605 F.2d 1117; *MacLeod v. County of Santa Clara* (9th Cir. 1984) 749 F.2d 541.

Eighth Circuit, the Eleventh Circuit, the Federal Circuit, and the highest courts of New York, Washington, Arizona, and the District of Columbia have expressed a willingness to determine from the evidence whether the uses permitted by the regulation permit the owner to obtain a reasonable return.[15]

Here, the Court of Appeal acknowledged the "considerable controversy" over whether to examine profit expectations (App. C, p 23), but concluded — again, as a matter of law, without evidence — that LBE could not even raise the issue (App. C, pp 24-25).

The question is: what needs to be alleged? LBE alleged facts showing that it had worked long and hard with both the County and the City to develop plans which were acceptable to the regulators, received assurances from the regulators that the project was acceptable, and then — after the expenditure of millions of dollars in reliance — the regulators decided to preclude development. LBE seeks only the chance to present its case to a trier of fact. Those facts show sufficient interference to warrant trial.

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15 E.g., *Florida Rock Indus., Inc. v. United States* (Fed. Cir. 1986) 791 F.2d 893; *Northern Westchester Professional Park Associates v. Town of Bedford* (1983) 60 N. Y. 2d 492, 458 N.E. 2d 809; *Orion Corp. v. State* (1987) 109 Wash. 2d 621, 642 ("present, possible, and reasonably profitable use"); *Ranch 57 v. City of Yuma* (1986) 152 Ariz. 218, 731 P 2d 113 ("reasonable return on the property"); *Hornstein v. Barry* (D. C. App. 1987) 530 A.2d 1177 ("reasonable financial return"); *Wheeler v. City of Pleasant Grove* (11th Cir. 1987) 833 F.2d 267, 271 ("... the landowner's loss takes the form of an injury to the property's potential for producing income or an expected profit"); *Nemmers v. City of Dubuque* (8th Cir. 1985) 764 F.2d 502, 504-05 (reasonable return on the difference in value with and without the offending regulation).

II. THE COURT BELOW CONTINUED CALIFORNIA'S REFUSAL TO FOLLOW THIS COURT'S DECISION IN *FIRST ENGLISH* WHEN IT HELD THAT THE GOVERNMENT'S GOOD INTENTIONS PRECLUDED ANY FINDING OF A TAKING

What happened in the Court of Appeal seems evident: the Court of Appeal agreed with the *goals* announced by the City and the County and, as a consequence, failed to subject those governmental assertions to any scrutiny at all (in sharp contrast to *McDougal*, discussed above), and then went so far as to hold that LBE could be wiped out financially without recourse so long as the governmental intentions were perceived to be legitimate. There is no mistaking the Court of Appeal's theory. These are its own words:

> "Where the public benefits greatly, it is constitutional to restrict the use of one's land. [Citation.] In some cases, *no compensation* may be required *even if* almost all uses are taken. [Citation.]" (App C, p 10; emphasis added.)
>
> "*No taking* results when a partial moratorium measure is enacted to protect the public health, safety or morals. [Citation.]" (App C, p 19; emphasis added.)

That theory is utterly at odds with this Court's *First English* decision, in which it was plainly stated that:

> "This basic understanding of the [Fifth] Amendment makes clear that it is designed not to limit the governmental interference with property rights per se, but rather *to secure compensation in the event of otherwise proper interference* amounting to a taking." (482 U.S. at 314-315; emphasis added.)

The decision below is also in direct conflict with the 9th Circuit's *McDougal* decision which says:

"We cannot agree that any legitimate purpose automatically trumps the deprivation of all economically viable use, such that whenever a regulation has a health or safety purpose, no compensation is ever required even if the land owner is thereby denied all use of his property.

* * *

"To hold that a legitimate public interest alone precludes a taking without regard to the degree of private deprivation turns the Court's balancing of interests into a bright-line test for which there is no precedent. The Court's own disclaimers make this clear. [Citations.]" (942 F.2d at 676, 677)

A. The Decision Below Conflicts With Other Decisions of this Court

This Court has consistently held that good governmental intentions cannot be accomplished in defiance of the Fifth Amendment. *First English* was express on the subject. (482 U.S. at 321) That is also the clear import of cases like *Kaiser Aetna v. U.S.* (1979) 444 US 164, *U.S. v. Security Industrial Bank* (1982) 459 US 70, and *Loretto.*[16] In each of them this Court concluded that properly motivated governmental goals could be accomplished only in compliance with the Fifth Amendment.

In a similar vein, of course, are cases such as *Preseault v. ICC* (1990) 494 U.S. 1, *Ruckelshaus v. Monstanto Co.* (1984) 467 U.S. 986, *Dames & Moore v. Regan* (1981) 453 U.S. 654, and the *Regional Rail Reorganization Act Cases* (1974) 419 U.S. 102. In each of them, this Court was faced with the

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[16] Involving, respectively, public access to a private marina, retroactive application of bankruptcy legislation, and cable TV access to apartment buildings.

claim that Congress, in pursuit of legitimate goals,[17] had taken private property in violation of the Fifth Amendment. In each, this Court directed the property owners to the U.S. Claims Court to determine whether these legitimate exercises of legislative power required compensation.

The decision below elevates good intentions above the Constitution. That, it cannot do.

B. The Decision Below is Typical of California Decisions Since 1987 Which Pay No More Than Lip Service to This Court's Seminal Decision in *First English*

In 1987, this Court bluntly told the California courts that they were out of step with this Court's interpretation of the Just Compensation Clause and with most of the rest of the country, as well:

As this Court put it in *First English*:

> "[T]he California courts have decided the compensation question inconsistently with the requirements of the Fifth Amendment." (482 U.S. at 311)

Two weeks later, the Court decided *Nollan*. There, striking down as "extortion" (483 U.S. at 837) a standard California Coastal Commission permit condition (repeatedly applied and judicially approved in California), this Court said:

> "Our conclusion on this point is consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts." (483 U.S. at 839)

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[17] Respectively, the preservation of rail transportation corridors, the registration of pesticides, the aftermath of the Iranian hostage crisis, and the provision of rail service to the Northeast United States.

One would have thought that double-barrelled message would have been clear and that the California judiciary would have responded by providing the protection demanded by this Court and the Constitution. Everyone who thought that has been disappointed. The California courts have continued as though it were "business as usual," apparently counting on this Court's limited capacity to review state court judgments to insulate their continued scofflaw *modus operandi* from review.

The blunt fact, however, is that the California Courts of Appeal have refused to follow this Court's decision in *First English*. (The California Supreme Court has declined to review *any* regulatory taking cases since *First English*.) This began with the remand of *First English* itself, as recently noted by the 9th Circuit Court of Appeals, which said that it did "not believe" that the California court's decision on the *First English* remand was based on "an accurate description of the Chief Justice's opinion . . . ." (*McDougal*, 942 F.2d at 679) That California attitude continues through cases like the one at bench. The analysis in this case makes it clear that the California judiciary remains unwilling to acknowledge that government regulation can run afoul of the Fifth Amendment. The facts alleged here are outrageous. Yet the California courts refused even to permit the matter to go to trial. It is time to return the law of California to that of the rest of the Union.

III. ARBITRARY AND CAPRICIOUS LAND USE REGULATIONS — UNRELATED TO THE PURPOSES SUPPOSEDLY SERVED BY THEM — VIOLATE PROPERTY OWNERS' SUBSTANTIVE DUE PROCESS RIGHTS

The Ninth Circuit recently summarized the rules relating to actions alleging deprivation of substantive due process:

> "We have recognized that the due process clause includes a substantive component which guards against arbitrary and capricious government action, even when the decision to take that action is made through procedures that are in themselves constitutionally adequate. [Citation.]" (*Sinaloa Lake Owners Assn. v. City of Simi Valley* [9th Cir. 1989] 864 F.2d 1475, 1483)

The reason for this type of protection is to guard against the human tendency to overreach:

> "[G]overnmental power is a double-edged sword; if wielded in an abusive, irrational or malicious fashion it can cause grave harm. [Citation.]" (*Sinaloa*, 864 F.2d at 1484)

See also *Bateson v. Geisse* (9th Cir. 1988) 857 F.2d 1300, 1303 (judgment finding substantive due process violation was affirmed because ". . . the interference with property rights was irrational or arbitrary") and *Herrington v. County of Sonoma* (9th Cir. 1987) 834 F.2d 1488, 1501, amended in other respects, 857 F.2d 567 (judgment finding substantive due process violation was affirmed because the County's action ". . . was irrational or arbitrary").

To determine whether a substantive due process violation has occurred, a factual inquiry — resulting in a balancing process — must be performed:

> "[i]n determining whether the constitutional line has been crossed, a court must look to such factors as the need for the [governmental action], the relationship between the need and the [action taken], the extent of [damage] inflicted, and whether [the action was taken] in a good faith effort . . . or maliciously . . . for the very purpose of causing harm." (*Sinaloa*, 864 F.2d at 1486; brackets, the Court's.)

Here, the complaint plainly alleges that there was no rational justification for preventing development of LBE's property. LBE had cooperated with both the County and the City in planning the development of the entire area of which its property was a small part, had contributed money toward the construction of oversized utilities through neighboring properties in order to service the expected development of its own property, and purchased the property only after being assured that its development concepts were compatible with those of the County and City. The complaint alleges that there were adequate facilities to service the LBE development without burdening either the County of the City. Thus, refusal to permit development was irrational, arbitrary, and capricious. Enough was alleged to merit trial.

IV. THERE IS HOPELESS CONFUSION THROUGHOUT THE COUNTRY ON WHAT IT TAKES TO "RIPEN" A REGULATORY TAKING CASE FOR LITIGATION ON THE MERITS

"Ripeness" in land use litigation does not seem to be a concept whose full ramifications have been carefully considered by this Court. Rather, in the course of not deciding the compensation issue in cases which preceeded *First English* during the 1980s, this Court concluded that the facts of the cases before it were, for one reason or another, not sufficiently well-developed to form the basis for such a conclusion.

The rules were plainly developed in an *ad hoc* way, and seem intended to be applied in later cases in a similar *ad hoc* way, depending on the circumstances of those later cases.

However, as illustrated by the case at bench, some lower courts — feeling more comfortable applying rules mechanically — are treating this Court's *ad hoc* determinations as though they were carved on stone tablets and not to be

varied. Because of the rapid proliferation of "ripeness" decisions in the lower courts, this Court's guidance is needed to explain the flexible nature of the investigation required by the "ripeness" concept. In other fields of law, for example, the Court has not discussed "ripeness" in the rigid manner which appears in the land use field. Rather, it has said that the concept must be applied in a ". . . pragmatic way . . ." (*Abbott Laboratories v. Gardner* [1967] 387 U.S. 136, 149) For example, in *Columbia Broadcasting System v. United States* (1942) 316 U.S. 407, a case involving an FCC rule which had not yet been applied to any broadcaster, the Court found a dispute which was ripe for decision:

> "Such regulations have the force of law *before* their sanctions are invoked as well as after. When, as here, they are promulgated by order of the Commission and the *expected* conformity to them causes injury cognizable by a court of equity, they are appropriately the subject of attack . . ." (316 U.S. at 418-19; emphasis added.)

See also *Maryland Casualty Co. v. Pacific Coal & Oil Co.* (1941) 312 U.S. 270, 273:

> "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."

That description, setting aside municipal game-playing,[18] aptly describes most land use controversies which reach litigation.

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[18] See *San Diego Gas & Elec. Co. v. City of San Diego* (1981) 450 U.S. 621, 655-656, fn. 22 [Brennan, J., dissenting]; *Nollan*, 483 U.S. at 841; *First English*, 482 U.S. at 321.

A. There Are No Rational Rules

The absence of rational rules is evident merely by examining the land use/ripeness decisions rendered by this Court. The one thing which emerges is that not even the Justices of this Court can confidently say that they know when a land use case is sufficiently ripe.

In *San Diego Gas*, for example, the issues were held not ripe — by a vote of 5-4. *Williamson County* went 6-3 against ripeness. *MacDonald, Sommer & Frates* was a 5-4 decision against ripeness. *First English* was held ripe, 6-3.

Thus, in four recent cases, the Justices of this Court cast 17 votes *for* ripeness and 19 votes *against* ripeness. When even the Justices of this Court have that much trouble agreeing on the ripeness of any particular case, it seems fair to conclude that there are no clear rules operating.

B. There is No Consistency

Nor is there any consistency.

For example, in *Preseault v. ICC* (1990) 494 U.S. 1, this Court held that an action challenging the constitutionality of legislation could not be ripe until after the property owner sought compensation for the legislation's impact. In stark contrast, California's courts hold that an inverse condemnation action seeking compensation cannot be ripe until after the property owner challenges the constitutionality of the legislation. (E.g., *Rossco Holdings, Inc. v. State* [1989] 212 Cal. App. 3d 642.)

In the case at bench, the California Court of Appeal held that "informal" presentations of development proposals *could not* suffice to ripen a controversy, while a panel of the 9th Circuit has held to the contrary. (Compare App. C, pp 14-15 with *Hoehne v. County of San Benito* [9th Cir. 1989] 870 F.2d 529.)

In the case at bench, the California Court of Appeal held that a variance must be applied for to ripen a controversy, while a panel of the 9th Circuit has held to the contrary. (Compare App. C, pp 16-17 with *Herrington v. County of Sonoma* [9th Cir. 1987] 834 F.2d 1488, 1496.)

The vagueness of the requirements of the ripeness requirement in land use cases results in random and inconsistent treatment of parties who are otherwise similarly situated. A more unjust result is hard to picture.

C. The "Rules" Used Below Are So Rigid That They Make No Sense and Ensure the Property Owner Will Lose

The rigidity with which the California court believed *this* Court *required* the ripeness "rules" in *Williamson County* and *MacDonald, Sommer & Frates v. County of Yolo* (1986) 477 U.S. 340 to be applied is expressed in the opinion:

> "The developer *must* establish that it has submitted at least one meaningful application for a development project which has been thoroughly rejected, *and* that it has prosecuted at least one meaningful application for a zoning variance, or something similar, which has been finally denied. [Citations.]" (App. C, pp 20-21; emphasis added.)

Thus, the Court below *categorically refused* to examine the facts on the *ad hoc* basis which this Court has repeatedly required. (See, e.g., *Kaiser Aetna v. U.S.* [1979] 444 U.S. 164, 175; *Penn Central*, 438 U.S. at 124.) Instead, the opinion insists that *all* cases must be forced into an immutable template of first applying for a development permit and then applying for a variance before it will consider a case "ripe" for judicial review.

The problem is that the opinion below takes a test designed for the "ad hoc" factual examination of *Williamson*

County and rotely applies it to *all* factual contexts. The inappropriateness of doing that at bench demonstrates the need for this Court to tell lower courts unequivocally that there is no set formula for ripeness, but rather an *ad hoc* examination of the facts of the particular case in light of its peculiar circumstances.

Here, for example, the property owner was faced by two different agencies. The County, which had actual, legal charge over regulation of this property, refused to do anything, abdicating in favor of the City. The City, after much planning and replanning, refused to complete the processing of preliminary planning work needed to permit development. The County also refused to approve any planning and zoning changes which would permit development. Both entities made it clear that development was precluded. No purpose would have been served by jumping through additional theoretical hoops for the sole purpose of "ripening" a case for litigation, as opposed to actually seeking to develop property. What could be more final than statements between governmental decision makers that no approval would be given and that LBE should seek its resolution in court? LBE does not believe this Court intended its ripeness rules to be applied solely as academic exercises, when there is no realistic hope that further action will result in development permission.

In this field, lower courts have even had trouble agreeing on how to determine when it is "futile" for a property owner to continue with fruitless applications:

> "The lower federal court attempts to *wrestle* with the meaning of 'futility' have led to a *bewildering* set of judicial statements." (Mandelker & Blaesser, *Applying the Ripeness Doctrine in Federal Land Use Litigation*, 11 Zoning & Planning Law Report

[July-Aug 1988] 49, 53; emphasis added.)[19]

In *First English*, this Court demonstrated the flexibility intended for the "ripeness" concept which, here, the court below ignored. In *First English*, suit was filed one month after the regulation was adopted — without *any* application for a permit or variance — because the regulation permitted no economically viable use. The County attempted to have this Court dismiss the appeal because of this supposedly "unripe" condition. This Court refused to do so, and dealt with the substantive issue presented.

Thus, where it is clearly alleged[20] that the regulation denies all economically viable use — in contrast to situations like *Williamson County*, where the issue was the *type* of development, not whether there could be *any* reasonable development — *First English* indicates that a case is ripe for adjudication *without more*, because the regulator's final answer is certain.

Two commentators recently surveyed the field and concluded that there is little rhyme or reason to the application of the ripeness concept. Not only did they find differences from one court to another, they found inconsistent results even within the single court which has treated the issue most

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[19] In fields other than land use, this Court has had no trouble recognizing futility and excusing parties from engaging in it as a prelude to litigation. (See, e.g., *Glover v. St. Louis-San Francisco Ry. Co.* [1969] 393 U.S. 324, 330-331 [discrimination by labor union against its members]; *Houghton v. Shafer* [1968] 392 U.S. 639, 640 [denying law book use to prison inmate]; *King v. Smith* [1968] 392 U.S. 309, 312, fn. 4 [denial of AFDC benefits].) In each case, there was an available administrative avenue which, if pursued, theoretically could have yielded the relief sought. This Court lost no time in explaining that there was no requirement to seek theoretically available, but pragmatically futile, relief before filing suit.

[20] Please recall that, like *First English*, this is a pleading case in which no factual inquiry has yet been made by any court. All that is before this Court is the factual allegations in the pleadings.

often. That sort of confusing result cries out for this Court's intervention:

> "The 'finality' requirement has been the *most troublesome* for the lower federal courts *to apply*. Some judges have openly admitted their *difficulty* in determining 'when enough is enough' under this requirement. [Citations.]
>
> "The Court of Appeals for the Ninth Circuit has had the most opportunities to refine this first prong of the ripeness doctrine. But its *decisions have not yet yielded any predictable approach* for plaintiff property owners." (Mandelker & Blaesser, *Applying the Ripeness Doctrine in Federal Land Use Litigation* 11 Zoning & Planning Law Report [July-Aug. 1988] 49, 53; emphasis added.)[21]

The reality of the confusion spawned by the ripeness "rules" is that the odds overwhelmingly favor the government. As one government lawyer expressed it, "[l]ike the vagueness of the three-factor analysis [for determining what is a taking], this [ripeness] requirement has historically worked to the advantage of government regulators." (Lawrence, *Regulatory Takings: Beyond the Balancing Test* [1988] 20 The Urban Lawyer 389, 400 fn. 71) The playing field needs to be levelled in order to satisfy the Fifth Amendment protection guaranteed property owners.

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[21] The 9th Circuit's confusion about "futility" has led it to go so far as to hold that, in order for a property owner to prove that it *would be futile to apply* for a permit, the property owner *must actually apply and be turned down!* (*Kinzli v. City of Santa Cruz* [9th Cir. 1987] 818 F.2d 1449, 1454)

CONCLUSION

In *First English* and *Nollan*, this Court declared that the rights of property owners are to be protected by the judiciary against the ". . . cleverness and imagination . . ." of governmental word games (*Nollan*, 483 U.S. at 841), even if that ". . . lessen[s] to some extent the freedom and flexibility of land use planners and governing bodies of municipal corporations . . ." (*First English*, 482 U.S. at 321). In the process, this Court recognized a meaningful, compensatory remedy for regulatory takings.

However, if there is no way to get a regulatory taking case to trial, the remedy is unavailable. If this Court is as serious about Constitutional protection for private property owners as its 1987 decisions indicate and the recent grants of Certiorari in *Yee*, *PFZ*, and *Lucas* appear to reinforce, further explication is needed. Your message is not being heard by many lower courts.

Petitioner prays that Certiorari be granted.

Dated: December 23, 1991.

Respectfully submitted,

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EXHIBIT A

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

COURT OF APPEAL-SECOND DIST.
FILED
MAR 15 1991
ROBERT N. WILSON, Clerk

Deputy Clerk

LONG BEACH EQUITIES, INC., etc.,
Plaintiff and Appellant,
v.
COUNTY OF VENTURA, et al.,
Defendants and Respondents.

2d Civil No. B045047
(Super. Ct. No. 103364)
(Ventura County)

THE CITY OF SIMI VALLEY, et al.,
Petitioners,
v.
SUPERIOR COURT OF THE
COUNTY OF VENTURA,
Respondent.

LONG BEACH EQUITIES, INC., et al.,
Real Parties in Interest.

No. B046558

Long Beach Equities, Inc. (LBE) desires to build 249 single-family residences on a 250-acre parcel of land it owns adjacent to the City of Simi Valley (City). LBE contends that land use regulations of the County of Ventura (County) and City, on their face and as applied, will so greatly delay its development plans as to render them economically infeasible.

We hold that this suit is not ripe for adjudication. We affirm the judgment for County and grant City's petition for issuance of a writ of mandate to compel the trial court to enter an order sustaining City's demurrer without leave to amend.

LBE sued these entities seeking damages for inverse condemnation, among other things.[1] The trial court sustained County's demurrer to LBE's first amended complaint without leave to amend. LBE moved for reconsideration and proffered a second amended complaint. The court denied the motion and sustained City's demurrer without leave as to several counts, but overruled that demurrer on counts for inverse condemnation, denial of due process and declaratory and injunctive relief.

LBE appealed the judgment entered on County's demurrer and the ruling rendered on its motion for reconsideration. City filed a petition for a writ of mandate to compel the trial court to vacate its order overruling the demurrer. We have consolidated these actions on appeal in the interest of judicial economy and to aid in the resolution of this lawsuit. (*Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1272; see 9

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[1] Complainant Marr Ranch Associates is not a party to this appeal. Also, LBE has sued the County Board of Supervisors, the Ventura Planning Commission and the Simi Valley City Council. We shall refer to all County and City defendants as County and City, respectively.

Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 62, pp. 86-87, § 64, pp. 88-89, § 65, pp. 89-90.)

STANDARDS OF REVIEW

LBE has the burden to prove that the trial court abused its discretion in sustaining County's demurrer without leave to amend. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) The City has the burden to show that the trial court's order is erroneous as a matter of law and that it will suffer harm which cannot be corrected on further appeal. (*Omaha Indemnity Co. v. Superior Court, supra*, 209 Cal.App.3d at pp. 1273-1274.)

We must construe the allegations of LBE's complaint liberally to attain substantial justice among the parties. (Code Civ. Proc., § 452.) We deem true all material and properly pleaded facts. (*Pan Pacific Properties, Inc. v. County of Santa Cruz* (1978) 81 Cal.App.3d 244, 251.) We also shall consider all the matters which have been determined by the trial court as appropriate for judicial notice. (Code Civ. Proc., § 430.30; *First English Evangelical Lutheran Church v. County of Los Angeles* (1989) 210 Cal.App.3d 1353, 1368.)[2]

We cannot consider, however, conclusions of fact or law, opinions or speculation and allegations which are contrary either to law or to the judicially-noticed facts. (See *Pan Pacific Properties, Inc. v. County of Santa Cruz, supra*, 81 Cal.App.3d at pp. 251, 255, fn. 2; *Agins v. Tiburon* (1980) 447 U.S. 255, 259, fn. 6.)

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[2] The California Court of Appeal heard *First English Evangelical Lutheran Church v. County of Los Angeles, supra*, 210 Cal.App.3d 1353 (hereinafter cited as *First English II*) on remand from the Unites States Supreme Court in *First Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304 (hereinafter cited as *First English I*).

BACKGROUND

On June 25, 1969, the Ventura County Planning Commission adopted Guidelines for Orderly Urban Development (Guidelines). The Guidelines were adopted to assure the "efficient provision of urban services and sound urban land use planning" and to avoid "the problems and costs associated with urban sprawl" through coordinated planning with other local government entities.

The Guidelines provide policies, standards and criteria to evaluate applications for zone changes from rural to urban land use classifications and for "related land use development matters."

The Guidelines provide that urban growth of developing communities in Ventura County should proceed in a compact and logically expanding form which includes satisfactory permanent open space areas. Proposed development should be functionally linked to the agencies providing public services in the area for efficiency and accessibility of community facilities, utilities and services, employment centers and cultural opportunities.

Those areas served by the facilities and utilities of a city should be located within the limits of that city; urban development should be required to locate within cities, and proposed developments at the fringe of existing developed areas should be examined for their impact on the costs of governmental services and anticipated revenue.

The stages of development contained in the Ventura County General Plan, in their present form and as revised later, are to be utilized to evaluate development proposals and government actions which spur urbanization.

A revision of the Guidelines in 1976 emphasized that urban development should occur within incorporated cities. Applicants for development within a city's sphere of influence were directed to apply to the appropriate city, instead of the county. Annexation of unincorporated properties was encouraged to ensure that urban services are provided by municipalities rather than by county service areas.

As of 1980, City's General Plan designated the subject area for residential development of a maximum of 1,100 units and for a shopping center.

On September 15, 1981, County's Open Space Plan designated the area of the subject property as open space. This designation generally allows for minimum lot sizes of 10 acres. County also adopted City's General Plan as the Simi Valley Area Plan (the SVAP) portion of the County's General Plan. The County's plan shows an "Urban Reserve overlay" for the area of the property. This overlay contemplates residential development, but it encourages developers to deal directly with the appropriate city to proceed.

LBE alleges that in adopting the SVAP, the County expressly recognized that the property should be developed with urban uses in the densities stated in the text because: (1) the SVAP showed that over 80 percent of the area's valley floor had already been developed; (2) private and public utility and sewer infrastructure had been extended to meet the needs of the development and is more than adequate to provide service at comfortable levels of safety, adequacy and efficiency; (3) development at the density designated is necessary to meet the residential housing needs of the area and to fulfill the County's regional housing obligations; (4) the County recognized the City's desire that the property be developed as shown in the City's General Plan.

In 1984 LBE purchased 250 acres of land located in unincorporated territory adjacent to and within the sphere of influence of City.[3]

LBE alleges that before it purchased the property, the City agreed that if LBE submitted a specific plan for 1,100 units it would be approved. Pursuant to City's request, LBE prepared such a specific plan. It paid all fees for that plan and for an Environmental Impact Report (EIR) on the plan. The City Council then became the applicant for the specific plan which provided for development of 1,730 units on the combined properties. To accommodate new grading ordinances, the specific plan and a proposed general plan amendment were modified to reduce the number of units to 1,059 and to eliminate the shopping center.

LBE helped to pay for oversized infrastructure adjacent to its property which could service the development project at the density set forth above. LBE shared in engineering costs for easements it granted. All necessary infrastructure and public services for the projected residents of the property are in place. LBE asserts that the property would be serviced by county service districts.

In late 1985, City passed an urgency interim ordinance. The ordinance imposed a partial moratorium on approval of various land use permits, particularly in hillside areas, until City could review and revise its General Plan. City enacted the ordinance after it monitored development and land use trends in the community. It realized that various land uses then permitted might conflict with proposed revisions to its General Plan.

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[3] Marr Ranch Associates purchased 2,538 acres in the same area.

City enacted the interim measure to consider those proposals "in an atmosphere of land use stability . . . ." LBE alleges that the ordinance "effectively imposed a moratorium on all processing of major new projects . . . ."

In July 1986, City also adopted a temporary growth management plan which would severely limit the number of building permits to be issued annually. The plan takes note of population trends and includes provisions for reevaluation in 1991 based on facts obtained from the 1990 census. These facts are to be considered in relation to the criteria set forth in the measure, in the revised General Plan and in the County population guidelines. The plan is effective until January 1, 1996.

The plan requires that a developer obtain approval of its proposed project from City, among others, to become eligible for a waiting list to apply for building permits.

The revised City General Plan, adopted in October 1988, designated approximately 325 units for LBE's property. LBE then prepared, but did not file, a tentative map for 249 single family residences to meet the new design criteria of City and County.

City now requires that another specific plan on the entire property be prepared. LBE alleges that this requirement is illegal.

On information and belief, LBE alleges that it would take up to 10 years to proceed with the proposed 249-unit development. LBE would be required to complete a specific plan and an EIR, process other required land use applications and get in line to compete with other development applicants for available building permits.

LBE asserts conclusional allegations that "[t]he inescapable fate of delay" is clear and that its tremendous carrying costs cannot be overcome. It alleges that

its property would diminish in value until it is worth nothing.

Because it "recognized" the "impossibility of developing within the City's jurisdiction, . . ." LBE turned to the County which "foreclosed all development of the Property whatsoever."

County amended its General Plan on May 24, 1988, allegedly to foreclose LBE's development project. County temporarily rescinded the applicable area plan. It downzoned much of the property to OS-160 (open space zoning which allows one unit per 160 acres), and it temporarily precluded all processing of any development in the urban reserve overlay. It denied LBE's prescreening application which sought to amend the County's General Plan.

Around August 1988, County would not let LBE make application to process the project through County. County told LBE it must first apply for a general plan amendment and promote the adoption of a new area plan for Simi Valley. LBE alleges this could take two to three years.

LBE applied for a prescreening application to seek the general plan amendment. The County Board of Supervisors considered LBE's application on January 17, 1989, and denied the application, stating that any development of the proposed project must occur in the City after annexation. This has been the position of County since 1969.

The Complaint

LBE recites these allegations to support its seven causes of action. First, it alleges inverse condemnation. LBE states that City and County's actions in rescinding the area plan, forbidding all development in the urban

reserve overlay, downzoning the property, imposing a de facto or actual moratorium (on development) and imposing a growth-control plan to preclude large scale residential development has resulted in a de facto taking in violation of article I, sections 7 and 19 of the California Constitution and of the Fifth and Fourteenth Amendments to the United States Constitution.

LBE alleges that these actions deprive the subject property of substantially all its value, renders it unmarketable and forbids substantially all reasonable economic beneficial use of the property, thereby thwarting its reasonable investment-backed expectations.

The second cause of action is for denial of substantive and procedural due process. LBE asserts that the defendants have restricted the use of its property to open space without a legitimate purpose and without evidence to support such action.

The third cause of action alleges denial of equal protection because defendants have limited the use of LBE's property to open space in contrast to uses allowed the owners of comparable properties in the County.

The fourth cause of action seeks relief for deprivation of civil rights under 42 United States Code sections 1983 and 1988. LBE alleges that defendants knowingly and wrongfully deprived it of due process, equal protection and just compensation under the California and federal constitutions under color of state law.

The fifth cause of action is captioned conspiracy to deprive plaintiffs of civil rights. It realleges the various actions of City and County as a pattern of conduct intended to deprive LBE of its legal rights under color of state law.

The sixth cause of action seeks declaratory and injunctive relief as to the rights, duties, and obligations

among the parties regarding the various actions alleged in the complaint.

Lastly, LBE seeks a writ of mandate under Code of Civil Procedure section 1085 for abuse of discretion by County in acting in the manner described above.

LBE alleges it exhausted all "reasonable" administrative remedies; or, alternatively, that its attempts to secure such relief would be "impractical and futile."

DISCUSSION

To state a cause of action for inverse condemnation, LBE must plead facts which show either that: (1) the application of the general zoning laws to its property does not substantially advance a legitimate state interest; or (2) such laws deprive it of substantially all economically viable use of its land; or (3) it has been deprived of reasonable investment-backed expectations for the property because of such laws. (*Agins v. Tiburon, supra,* 447 U.S. at pp. 260, 262; also see *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825, which refined the first prong of the *Agins* test to require that the regulation advance the precise state interest which avowedly motivated it.)

No precise rule exists to determine when property has been taken by inverse condemnation. (*Agins v. Tiburon, supra,* 447 U.S. at pp. 260-261; *MacDonald, Sommer & Frates v. County of Yolo et al.* (1986) 477 U.S. 340, 348-349.) We start with the proposition that government regulations are presumed to be motivated by and to reasonably serve their avowed purposed. (*First English II, supra*, at p. 1372.) We then weigh the private interest asserted against the public's interest as shown in enactments passed in the exercise of the state's police powers. Where the public benefits greatly, it is constitutional to

restrict the use of a person's land. (*Id.*, at pp. 1366-1367, fn. 10.) In some cases, no compensation may be required even if almost all uses are taken. (*Id.*, at p. 1366.)

Facial Attack on Legislation

Local government legislation is constitutional on its face if it bears "a substantial relationship to the public welfare . . ." and inflicts no irreparable injury on the landowner. (*Agins v. Tiburon, supra,* 447 U.S. at p. 261; *Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365, 395-397.) This is true even where a substantial diminution in value of the property is alleged. (*Agins, supra,* at p. 261.)

Both County's Guidelines and City's growth management ordinances satisfy this test. The Guidelines require the "efficient provision of urban services and sound urban land use planning" to avoid "the problems and costs associated with urban sprawl . . . ."

The criteria in the Guidelines are well designed to accomplish precisely this legitimate purpose. They require compact development within existing cities which can closely link public services, employment and cultural opportunities in an efficient and centralized manner. Such development is intended to include and preserve "satisfactory permanent open space areas . . . ."

LBE argues that County and City's actions to thwart LBE's project are contrary to Government Code provisions which support the development of housing, citing Government Code sections 65583, 65580, and 65581. Although these sections promote the development of residential housing, such development is not encouraged when it destroys needed open space and contributes to urban sprawl. (See Gov. Code, § 65561, subd. (b).)

Government Code section 65561, subdivision (b) promotes the enactment of local ordinances designed to preserve open space; such ordinances discourage the "premature and unnecessary conversion of open-space land to urban uses . . . ." California recognizes that the preservation of open space is necessary to assure "the continued availability of land for the production of food and fiber, for the enjoyment of scenic beauty, for recreation and for the use of natural resources." (Gov. Code, § 65561, subd. (a).)

County's Guidelines are an exercise of the government's police powers which substantially advance the goals of Government Code section 65561, subdivision (a) — to prevent the ill effects of poorly planned urbanization. (*Agins v. Tiburon, supra,* 447 U.S. at p. 261; *First English II, supra,* at p. 1370.) To accomplish these goals, the Guidelines urge landowners such as LBE to apply for annexation to a city to assure that public services will be properly and adequately provided by an existing municipality.

City's growth management ordinance is also designed to accomplish these goals. The City expressly recognizes the need for new jobs, improved shopping facilities and housing opportunities for all the residents of the community.

City enacted the ordinance (No. 638) "to protect the unique, hill-surrounded environment; enhance the quality of life; promote public health, safety or welfare and the general well-being of the community . . . ." By limiting the rate, distribution, quality and type of residential development on an annual basis, with periodic reviews of the ongoing situation, City seeks "to improve local air quality, reduce traffic demands . . . and ensure that future demands for such essential services as water, sewers and the like are met . . . ."

Such government purposes, which protect the public weal, have long been recognized as legitimate. (See *Agins v. Tiburon, supra,* 447 U.S. at pp. 261-262, citing *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, 129; *Village of Belle Terra v. Boraas* (1974) 416 U.S. 1, 9; *Euclid v. Ambler Realty Co., supra,* 272 U.S. at pp. 394-395.) Courts will not interfere with a municipality's determination of policy. (*Associated Home Builders Etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 605.)

Ordinances which seek to preserve the surrounding environment and which consider open space and the density of development benefit both developers and the public by "assuring careful and orderly development of residential property with provision for open-space areas." (*Agins v. Tiburon, supra,* 447 U.S. at p. 262.)

Ripeness of Attack on Legislation as Applied

An attack on regulatory legislation as applied to a particular parcel of property is not ripe for adjudication in inverse condemnation unless the plaintiff shows that: (1) the regulation has gone so far that it has accomplished a taking, and (2) that compensation tendered is not just. (*MacDonald, Sommer & Frates v. County of Yolo et al., supra,* 477 U.S. at p. 348; *Lake Nacimiento Ranch Co. v. San Luis Obispo Cty.* (9th Cir. 1987) 841 F.2d 872, 876.)

LBE bears a heavy burden to show that its "as applied" attack is ripe. LBE must first show that City and County have made a "final and authoritative determination of the type and intensity of development legally permitted on the subject property." (*MacDonald, Sommer & Frates v. County of Yolo et al., supra,* 477 U.S. at p. 348.) "A court cannot determine whether a

regulation has gone 'too far' unless it knows how far the regulation goes." (*Ibid.*)

The developer must establish that it has submitted at least one meaningful application for a development project which has been thoroughly rejected, and that it has prosecuted at least one meaningful application for a zoning variance, or something similar, which has been finally denied. (*Lake Nacimiento Ranch Co. v. San Luis Obispo Cty., supra,* 841 F.2d at pp. 876-877; see also *Williamson Planning Comm'n v. Hamilton Bank* (1985) 473 U.S. 172, 187-188; *Kinzli v. City of Santa Cruz* (9th Cir. 1987) 818 F.2d 1449, 1454, as amended at 830 F.2d 968.) Informal or tentative development proposals are insufficient to meet these tests. (*Lake Nacimiento, supra,* at p. 876.)

The test is *not* one of exhaustion of a particular administrative remedy — whether the developer has exhausted all administrative appeals regarding a particular application. The developer must show that it has submitted the appropriate, meaningful applications necessary to proceed with the particular project and that it has received a final rejection of those applications. (*Williamson Planning Comm'n v. Hamilton Bank, supra,* 473 U.S. at pp. 186-190; *Lake Nacimiento Ranch Co. v. San Luis Obispo Cty., supra,* 84[illegible].2d at pp. 876-877.)

The case of *Kinzli v. City of Santa Cruz, supra,* 818 F.2d 1449, a case similar to the instant one, illustrates how these rules apply.

The Kinzli family owned land adjacent to the City of Santa Cruz for many years. Gradually the property became surrounded by urban development.

Through a stipulated judgment in eminent domain, the city successfully obtained four acres of the property for construction of a public street. The city promised the Kinzlis that they could develop the property with high

density uses once the road was built. The city never built the road.

In 1979, the voters passed a slow growth initiative which limited the use of the property to open space until 1990. The measure precluded the city from providing certain urban services in the area in which the property was located.

The city enacted a greenbelt overlay ordinance to implement the initiative. The ordinance set out the requirements to obtain special use permits and the conditions for extensions of urban services to the greenbelt area. Limited single family and accessory structures could be built upon application for special permits. High density development, formerly available and sought by the Kinzlis, was forbidden.

The Kinzlis tried to sell the property on the condition that residential building permits could be obtained. One potential buyer abandoned an application he filed on behalf of the Kinzlis because a government staff engineer told him that the city could not provide water to the property. The Kinzlis did not submit applications for other uses.

In 1980, the Kinzlis sued the city charging that the ordinance, and the city's conduct regarding the condemnation proceedings, violated federal constitutional and civil rights and rights under California laws.

At trial, the court discussed the merits of the taking claim and denied it. The appellate court found that the trial court erred in discussing the merits because the claim was not ripe. Because the Kinzlis had not submitted a "meaningful" development plan or an application for a variance, the appellate court held that the claim should have been dismissed. (See *Kinzli v. City of Santa Cruz, supra,* 818 F.2d at p. 1455.)

Failure to avail oneself of administrative solutions, which might obviate the need to consider constitutional questions, renders a claim for inverse condemnation unripe for adjudication. (*Hodel v. Virginia Surface Min. & Recl. Assn.* (1981) 452 U.S. 264, 297.)

In *MacDonald, Sommer & Frates v. County of Yolo et al., supra,* 477 U.S. 340, the Supreme court rejected as unripe allegations that a city and county unconstitutionally restricted use of its property to open space when it denied a tentative subdivision tract map to build 159 single and multiple family homes. (Pp. 344, 352, fn. 8.) There, as here, the plaintiff urged that any application for a zone change, a variance or other relief would be futile. Its allegations that all principal and accessory uses were no longer permitted and that its property had no value were rejected as speculative and conclusional. (*Id.*, at pp. 345, 351, citing *San Diego Gas & Electric Co. v. San Diego* (1981) 450 U.S. 621, 631-632, fn. 12; and *Williamson Planning Comm'n v. Hamilton Bank, supra,* 473 U.S. at pp. 187-188.)

Denial of approvals for a particular and relatively intensive residential development, as here, cannot be equated with a refusal to permit any beneficial use whatsoever. (*MacDonald, Sommer & Frates v. County of Yolo et al., supra*, 477 U.S. at p. 347.)

In the instant case, LBE has not submitted an application for annexation to City even though the Guidelines, since 1969, have urged developers who propose projects like this one to do so. Nor has LBE applied for a zoning change or variance. The open-space zoning ordinance at issue here has been in effect for the subject property since 1981. The revision of the General Plan is but a temporary situation. If LBE does not want to wait, it could apply for a variance to obtain a designation for 10-acre parcels per residential unit.

Nevertheless, LBE contends that County has foreclosed all developments of its property within County. LBE relies on the following passage from the amended general plan:

"The Urban Reserve overlay designation is applied to all unincorporated land within a city's adopted Sphere of Influence. Although LAFCO has determined these areas to be appropriate for eventual annexation and urbanization, the Urban designation was not applied to all lands within the LAFCO sphere boundaries because it could result in urban development being permitted without annexation. Accordingly, unincorporated lands within spheres have been designated under this General Plan either as Existing Community, Rural, Agricultural or Open Space. Under these designations, therefore, more intense development could not occur on affected lands until they are annexed."

This language does not foreclose all development, but merely restates County's position since 1969 on annexation. The growth management ordinance is a temporary, partial moratorium on certain kinds of development.

If LBE successfully applied for annexation, it could explore other possibilities for development under the growth management ordinance. These possibilities may not reflect what LBE desires to build. This, however, does not constitute an unconstitutional taking. (See *Williamson Planning Comm'n v. Hamilton Bank, supra*, 473 U.S. at pp. 187-188.) Proposals for affordable housing and housing for seniors, for example, have priority under the growth management ordinance. Therefore, LBE's claim of a regulatory taking, as applied, is not ripe. (*Kinzli v. City of Santa Cruz, supra*, 818 F.2d at pp. 1454-1455.)

LBE cannot take solace in *First English I, supra*, which stated that damages may be available for temporary total takings. In that case, the California courts assumed that a taking had already occurred. (See *First English I, supra*, at p. 311.) Moreover, *First English I, supra*, was expressly limited to its facts. Said the court: "We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." (*Id.*, at p. 321.) The Supreme Court then remanded the case to the California Supreme Court for further proceedings on the question of whether there had been an unconstitutional taking under the ordinance there in question.

Neither is it " 'clear beyond peradventure . . .' " that the growth management ordinance would result in such excessive delay that it can be assumed that all of the property's beneficial uses have presently been destroyed. (See *Kinzli v. City of Santa Cruz, supra*, 818 F.2d at p. 1454, fn. 5, citing *Norco Construction, Inc. v. King County* (9th Cir. 1986) 801 F.2d 1143, 1145.) The instant temporary ordinance calls for a reevaluation in 1991 of its restrictions, pursuant to the 1990 census and it automatically expires in 1996. Unless a temporary moratorium is total and is unreasonable in purpose, duration or scope, the restrictions it places on development are not compensable. (*First English II, supra*, at pp. 1372-1373.)

In *First English II, supra,* the county enacted a temporary moratorium on building after a flood so that it could conduct a study of the situation. This did not constitute an unconstitutional taking. No taking results when a partial moratorium measure is enacted to protect the public health, safety or morals. (*Id.*, at p. 1362; see

also *Associated Home Builders Etc., Inc. v. City of Livermore, supra,* 18 Cal.3d 582.)

Loss of Substantially All Economic Use

The second prong of the *Agins* taking test is whether the regulations deny the property owner substantially all economically viable use of the land. (*Agins v. Tiburon, supra,* 447 U.S. at p. 260.) The meaning of this concept is elusive, but the general rule is that "the existence of permissible uses determines whether a development restriction denies a property holder the economically viable use of its property." (*Lake Nacimiento Ranch Co. v. San Luis Obispo Cty., supra,* 841 F.2d at p. 877, citing cases.)

The denial of the highest and best use does not constitute an unconstitutional taking of the property. (*Macleod v. Santa Clara County* (9th Cir. 1984) 749 F.2d 541, 548.) Even where there is a very substantial diminution in the value of land, there is no taking. (*Id.*, at pp. 547-548, citing *Hadacheck v. Sebastian* (1915) 239 U.S. 394 — diminution in value from $800,000 to $60,000 not a taking; *William C. Haas v. City & Cty. of San Francisco* (9th Cir. 1979) 605 F.2d 1117, 1120 — diminution in value from $2 million to $100,000 not a taking.) The burden of proof is on the applicant, who faces an uphill battle. (*Lake Nacimiento Ranch Co. v. San Luis Obispo Cty, supra,* 841 F.2d at p. 877.)

In *MacLeod v. Santa Clara County, supra,* 749 F.2d 541, MacLeod purchased cattle grazing property and found it unprofitable. At one time the county granted him a use permit to harvest hardwood, which he also found to be unprofitable. Then, MacLeod attempted to farm the land, which he found infeasible due to irrigation problems.

He then successfully applied to the state for permission to harvest timber. He entered into a contract to sell harvested timber to a third party. County, citing various public health, safety and welfare concerns, denied him a use permit. MacLeod sued for inverse condemnation.

The court, ruling for the county, found that the denial of the permit application did not interfere with other primary objectives; (1) holding the property for investment purposes, and (2) cattle grazing. (*MacLeod v. Santa Clara County, supra,* 749 F.2d at p. 547.)

In *William C. Haas v. City & Cty. of San Francisco, supra,* 605 F.2d 1117, the appellant claimed that rezoning and imposition of other land use restrictions so diminished the value of his investment property that it amounted to a taking. The court disagreed.

On June 28, 1971, Haas contracted to purchase a large unimproved parcel of land in San Francisco. The contract was conditioned on the procurement of a valid site permit for his proposed high-rise development project.

As of July 7, 1971, the date of application for the permit, the property was zoned for the proposed use. Nonetheless, the planning commission denied the permit because the project "would have a detrimental effect on the City as a whole and upon the residents and property of the neighborhood." (*William C. Haas v. City & Cty. of San Francisco, supra,* 605 F.2d at p. 1119.) The city relied on a recent urban design plan developed for inclusion in the city's master plan.

Haas appealed on August 13, 1971. Two weeks later the commission formally adopted the urban design plan. On August 26, 1971, interim height and bulk restrictions were adopted by the commission, and Haas withdrew the application.

On November 9, 1971, Haas submitted a new plan to the commission to comply with the new height and bulk limitations. The commission approved the application for a site permit on the revised plans, and the board of permit appeals denied a petition for rehearing sought by surrounding residents. Haas then bought the land for $1,650,000, plus various fees. He broke ground and commenced construction.

A neighborhood improvement association filed a writ petition on April 20, 1972, on the ground that Haas failed to comply with the California Environmental Quality Acts of 1970 and 1972. Although he prevailed in the trial court, Haas lost on all appeals. The courts held that he did not state a sufficient claim for a vested right despite the site permit, because he had not undertaken "substantial construction" nor had he incurred substantial liabilities. Haas had to start anew.

By then, however, Haas faced "insurmountable barriers" to the proposed project because the planning commission had adopted a 40-foot height restriction, density controls and had rezoned the property. Haas sued to challenge the rezoning and other land use restrictions on constitutional grounds. He contended that the combined impact of these restrictions destroyed the value of his property investment.

The court held that, as a matter of law, he stated no claim for inverse condemnation. His numerous contentions all rested on the premise that the rezoning and the land use restrictions were so grossly disproportionate in their detriment to him, as opposed to the benefits conceivably inured to the public's general welfare, that they constituted a taking. (*William C. Haas v. City & Cty. of San Francisco, supra,* 605 F.2d at p. 1120.)

The *Haas* court upheld the land use regulations because they were reasonably related to health, safety, morals or general welfare. Such police power regula-

tions are routinely upheld even when they nearly destroy or severely affect recognized real property interest or flatly prohibit the most beneficial use. (*William C. Haas v. City & Cty. of San Francisco, supra,* 605 F.2d at p. 1120.) Although the standard of reasonable relation is lower than that set forth recently by the Supreme Court in *Agins* and *Nollan*, the purposes of a comprehensive plan to decrease population density, to preserve natural resources, and to promote aesthetics are sufficient to support the restrictions which have been enacted here as a matter of law. (*Id.* at pp. 1120-1121.)

LBE, like Haas, argued it was left with no economically viable use. Even if it were true that LBE's profit may be severely reduced, and we find this assertion speculative, it would fail to meet the test that there be no viable economic use of the property. This rule holds true even if the zoning restrictions preclude recovery of the initial investment made. (*William C. Haas v. City & Cty. of San Francisco, supra,* 605 F.2d at pp. 1120-1121.)

The restrictions in the growth management ordinance and the open-space zoning designations reveal the availability of beneficial uses upon annexation, such as senior or affordable housing. Although County has downzoned most of the subject property to O-S 160 (open-space designation permitting one residential structure per 160 acres of land), LBE may apply for a zoning variance for permissible 10-acre parcels. (And see *Lake Nacimiento Ranch Co. v. San Luis Obispo Cty., supra,* 841 F.2d at p. 877 — government entities need not show the availability of such uses.)

The availability of variances or of other additional special uses strongly suggests there are other economically beneficial uses not expressly included in such ordinances. (*Lake Nacimiento Ranch Co. v. San Luis Obispo Cty., supra,* 841 F.2d at p. 877.)

Reasonable Investment-Backed Expectations

LBE opines that its reasonable investment-backed expectations (RIBE), to profitably build out a subdivision of homes, has been rendered economically infeasible because of delays caused by the laws and the conduct of defendants.

There is considerable controversy whether courts should consider a landowner's profit expectations in an inverse condemnation action. (See *Lake Nacimiento Ranch Co. v. San Luis Obispo Cty., supra,* 841 F.2d at pp. 877-878, esp. fn. 4, citing *Williamson Planning Comm'n v. Hamilton Bank, supra,* 473 U.S. at pp. 190-191, fn. 12; and cf. *Keystone Coal Association v. DeBenedictis* (1987) 480 U.S. 470, 499.)

Although in some cases it may be a legitimate consideration, here LBE has not stated facts which enable it to proceed on this theory.

Although the developer in *Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785, spent more that $2 million in building infrastructure and had obtained a final map as well as a permit to complete rough grading, the court concluded that its failure to obtain a permit from the coastal commission and obtain final building permits left it without a vested interest upon which it could rely. (P. 793.)

The court so held even though it found that the approvals Avco had previously received led Avco to reasonably expect it would be allowed to build without further discretionary approvals. (*Avco Community Developers, Inc. v. South Coast Regional Com., supra,* 17 Cal.3d at p. 790.) Under *Avco,* one cannot obtain a vested right to build in reliance on "the assurances of city officials that construction . . . was permitted, . . ." or

on spending large sums for preliminary development costs. (*Id.*, at p. 792.)

According to *Avco,* reasonable investment-backed interests depend upon performing substantial work and incurring substantial liabilities based on good faith reliance on the actual issuance of building permits in accord with the laws applicable at the time of their issuance. (*Avco Community Developers, Inc. v. South Coast Regional Com., supra,* 17 Cal.3d at pp. 791-792.)

In *MacDonald, Sommer & Frates v. County of Yolo et al., supra,* 477 U.S. at page 349, the Supreme Court stated that until the landowner has obtained a final decision regarding the application of zoning and subdivision regulations to his property, it is impossible to know whether the land retains any reasonable beneficial use *or whether his reasonable investment-backed expectations have been destroyed.* LBE has not submitted an application for annexation, much less applied for and obtained an actual building permit. (See also *Agins v. Tiburon, supra,* 447 U.S. at p. 262.)

In *MacLeod v. Santa Clara County, supra,* 749 F.2d 541, all three bases of this theory are discussed. On the vested rights theory, the court said that although MacLeod had every reason to believe his application (for a county use permit to harvest timber) would be granted, he "must have been aware that the standards and conditions governing the issuance of the permit might cause his application to be denied." (*Id., at p. 548.*)

On the theory of economic viability, the court said that denial of the permit did not interfere either with holding the property for investment purposes or with the interim, although unprofitable, use of cattle grazing. (*MacLeod v. Santa Clara County, supra,* 749 F.2d at pp. 546-548.) Diminution in expected value, even if that loss is severe, does not constitute a taking. (*Id.*, at p. 548, citing *Hadacheck v. Sebastian, supra,* 239 U.S.

394 — $800,000 investment became worth $60,000; and *William C. Haas v. City & Cty. of San Francisco, supra,* 605 F.2d at p. 1120 — $2 million investment became worth $100,000.)

As here, the gravemen of MacLeod's contention was that a taking requiring compensation occurred "because he has been denied the opportunity to exploit his property by pursuing a particular project he had come to believe would be available for development. This argument fails." (*MacLeod v. Santa Clara County, supra,* 749 F.2d at p. 548; see esp. *William C. Haas v. City & Cty. of San Francisco, supra,* 605 F.2d at pp. 1120-1121; and also *MacDonald, Sommer & Frates v. County of Yolo et al., supra,* 477 U.S. at p. 347.)

" '[The] [p]rediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. . . .' " (*MacLeod v. Santa Clara County, supra,* 749 F.2d at p. 548, quoting *Andrus v. Allard* (1979) 444 U.S. 51, 66; and see *Hodel v. Virginia Surface Min. & Recl. Assn., supra,* 452 U.S. at pp. 296-297.) Since *Penn Central Transp. Co. v. New York City, supra,* 438 U.S. 104, the Supreme Court has rejected such arguments as " 'quite simply untenable.' " (*MacLeod, supra,* at p. 548, quoting *Penn Central Transp. Co. v. New York City, supra,* 438 U.S. at p. 130.) The Fifth Amendment "is not a panacea for less-than-perfect investments or business opportunities." (*Id.*, at p. 549.)

Regardless of how we analyze RIBE, we come up with the same conclusion — LBE has not stated facts which support recovery for inverse condemnation as a matter of law.

Due Process

LBE's due process allegations are conclusional, premature and, upon our review of the judicially-noticed legislation, incorrect as a matter of law. (*Kinzli v. City of Santa Cruz, supra,* 818 F.2d at p. 1456, citing the Supreme Court in *Williamson Planning Comm'n v. Hamilton Bank, supra*, 473 U.S. at p. 199.)

Even if a Fifth Amendment takings claim could arguably be recast as one sounding in substantive due process, it would be premature. (*Kinzli v. City of Santa Cruz, supra,* 818 F.2d at p. 1456.) And, there can be no denial of procedural due process, under the Fourteenth Amendment, until the substantive due process claim is ripe. (*Ibid.*)

An ordinance that is reasonably related to the public welfare of the population it significantly affects is constitutional. (*Associated Home Builders Etc., Inc. v. City of Livermore, supra,* 18 Cal.3d at pp. 606-607; also see *McMillan v. Goleta Water Dist.* (9th Cir. 1986) 792 F.2d 1453, 1457.) The Guidelines and the growth management initiative are reasonably related to the public welfare.

Equal Protection

LBE has insufficiently and improperly alleged that defendants have violated the equal protection clause of the Fourteenth Amendment to the United States Constitution. LBE alleged that defendants have arbitrarily set aside its property as open space as opposed to the use allowed owners of other comparable property.

Absent the allegation of the invasion of fundamental rights or the existence of a suspect classification, the right to equal protection is not violated unless the

classification made bears no rational relationship to a legitimate state interest. (*McMillan v. Goleta Water Dist., supra,* 792 F.2d at p. 1456; *Pennell v. San Jose* (1988) 485 U.S. 1, 14, citing *Vance v. Bradley* (1979) 440 U.S. 93.) This is true even if some discrimination is alleged. (*McMillan, supra,* at p. 1456.)

Here, the classification of the land as open space, which was made long before LBE purchased it, is rationally related to the legitimate state interest in preventing urban sprawl and its concomitant effects as outlined in the Guidelines and the growth management ordinance.

The allegation that defendants have treated LBE in a discriminatory manner as opposed to others is too vague. Although LBE's second amended complaint, proffered at the motion for reconsideration, more specifically alleged that owners of other property have been treated more equitably, there are material differences among these projects which render the allegation unsupportable as a matter of law.

In one instance, the development was never approved. In the other instances, sewer and water are being provided to the properties by facilities governed by entities other than the City Council.

The instant property, however, would likely be serviced by the Simi Valley County Sanitation District and the Waterworks District Number 8, both of which are governed by the City Council of Simi Valley. The requirement of annexation is entirely consistent with this situation, as explained in the Guidelines.

Civil Rights

LBE's allegation that it has been deprived of due process, equal protection and just compensation in inverse condemnation under color of state law, pursuant

to title 42 United States Code sections 1983 and 1988, is not ripe because there has been no final decision on meaningful applications. (See *Williamson Planning Comm'n v. Hamilton Bank, supra,* 473 U.S. at pp. 187-188.)

Conspiracy

LBE alleges a conspiracy among the defendants to perform the activities previously alleged. There is no separate cause of action for civil conspiracy apart form overt acts done in furtherance of activities which are legally compensable. (*Widdows v. Koch* (1968) 263 Cal.App.2d 228, 234; and see *Escamilla v. City of Santa Ana* (C.D.Cal. 1985) 606 F.Supp. 928, regarding 42 United States Code section 1983 allegations.) Because we find LBE has not alleged any actionable activities, we hold that there is no actionable conspiracy.

Relief by Writ, Injunction and Declaratory Relief

Because there is no basis in law or equity to grant relief under the facts alleged, there is no ground upon which we can grant relief by way of writ, injunction or declaration.

LBE has sued City and County because of disappointed expectations concerning its development plans. LBE states no cause of action even if it has expended substantial sums on infrastructure and preapproval planning, and even though there will be some delay in bringing some development proposal to fruition. These expenditures and delays are the normal incidents of development projects and are not actionable, per se.

We affirm the judgment as to County.

EXHIBIT B

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
ROBERT N. WILSON, CLERK

DIVISION: 6

Hamilton & Samuels
Karen J. Lee
4000 Macarthur Blvd.
Suite 5700
Newport Beach, CA. 92660

B046558

RE: Simi Valley, City of
VS.
Ventura County Superior Court
Long Beach Equities, Inc.
2 Civil B046558
Ventura No. 103364

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
ROBERT N. WILSON, CLERK

DIVISION: 6 DATE: 04/12/91

Hamilton & Samuels
Karen J. Lee
4000 Macarthur Blvd.
Suite 5700
Newport Beach, CA. 92660

RE: Long Beach Equities, Inc.
VS.
Ventura, County of

2 Civil B045047
Ventura No 103364

THE COURT:

THE PETITION FOR REHEARING IS GRANTED

EXHIBIT C

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

COURT OF APPEAL-SECOND DIST.
FILED
JUN 27 1991
ROBERT N. WILSON, Clerk

Deputy Clerk

LONG BEACH EQUITIES, INC., etc.,
Plaintiff and Appellant,
v.
COUNTY OF VENTURA, et al.,
Defendants and Respondents.

2d Civil No. B045047
(Super. Ct. No. 103364)
(Ventura County)

THE CITY OF SIMI VALLEY, et al.
Petitioners,
v.
SUPERIOR COURT OF THE
COUNTY OF VENTURA,
Respondent.

LONG BEACH EQUITIES, INC., et al.,
Real Parties in Interest.

No. B046558

OPINION ON REHEARING

Long Beach Equities, Inc. (LBE) desires to build 249 single-family residences on a 250-acre parcel of land it owns adjacent to the City of Simi Valley (City). LBE contends that land use regulations of the County of Ventura (County) and City, on their face and as applied, will so greatly delay its development plans as to render them economically infeasible.

We hold that this suit is not ripe for adjudication. We affirm the judgment for County and grant City's petition for issuance of a writ of mandate to compel the trial court to enter an order sustaining City's demurrer without leave to amend.

LBE sued these entities seeking damages for inverse condemnation, among other things.[1] The trial court sustained County's demurrer to LBE's first amended complaint without leave to amend. LBE moved for reconsideration and proffered a second amended complaint. The court denied the motion and sustained City's demurrer without leave as to several counts, but overruled that demurrer on counts for inverse condemnation, denial of due process and declaratory and injunctive relief.

LBE appealed the judgment entered on County's demurrer and the ruling rendered on its motion for reconsideration. City filed a petition for a writ of mandate to compel the trial court to vacate its order overruling the demurrer. We have consolidated these actions on appeal in the interest of judicial economy and

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[1] Complainant Marr Ranch Associates is not a party to this appeal. Also, LBE has sued the County Board of Supervisors, the Ventura Planning Commission and the Simi Valley City Council. We shall refer to all County and City defendants as County and City, respectively.

to aid in the resolution of this lawsuit. (*Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1272; see 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 62, pp. 86-87, § 64, pp. 88-89, § 65, pp. 89-90.)

STANDARDS OF REVIEW

LBE has the burden to prove that the trial court abused its discretion in sustaining County's demurrer without leave to amend. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) The City has the burden to show that the trial court's order is erroneous as a matter of law and that it will suffer harm which cannot be corrected on further appeal. (*Omaha Indemnity Co. v. Superior Court, supra,* 209 Cal.App.3d at pp. 1273-1274.)

We must construe the allegations of LBE's voluminous complaint liberally to attain substantial justice among the parties. (Code Civ. Proc., § 452.) We deem true all material and properly pleaded facts. (*Pan Pacific Properties, Inc. v. County of Santa Cruz* (1978) 81 Cal.App.3d 244, 251.) We also consider all documents which have been determined by the trial court as appropriate for judicial notice, many of which are mentioned in the complaint. (Code Civ. Proc., § 430.30; *First English Evangelical Lutheran Church v. County of Los Angeles* (1989) 210 Cal.App.3d 1353, 1368.)[2] They include resolutions, reports and other official acts of County and City. (*Pan Pacific, supra,* at p. 255, fn. 2.)

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[2] The California Court of Appeal heard *First English Evangelical Lutheran Church v. County of Los Angeles, supra,* 210 Cal.App.3d 1353 (hereinafter cited as *First English II*) on remand from the United States Supreme Court in *First Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304 (hereinafter cited as *First English I*).

We may not consider conclusions of fact or law, opinions, speculation or allegations which are contrary either to law or to judicially-noticed facts. (See *Pan Pacific Properties, Inc. v. County of Santa Cruz, supra,* 81 Cal.App.3d at pp. 251, 255, fn. 2; *Agins v. Tiburon* (1980) 447 U.S. 255, 259, fn. 6.)

The Complaint — The Facts

On June 25, 1969, the Ventura County Planning Commission first adopted Guidelines for Orderly Urban Development (Guidelines). The Guidelines provide policies, standards and criteria to evaluate applications for zone changes from rural to urban land use classifications and for "related land use development matters."

The Guidelines initially were adopted to assure the "efficient provision of urban services and sound urban land use planning" and to avoid "the problems and costs associated with urban sprawl" through coordinated planning with other local government entities.

Those Guidelines provided that urban growth of developing communities in Ventura County should proceed in a compact and logically expanding form which includes satisfactory permanent open space areas within physically developed land.

The revised Guidelines of 1976 and 1985 continued the theme that urban development should occur within existing, incorporated cities because cities provide a full range of municipal services. County removed the language regarding retention of permanent open space within developed land in its revised Guidelines.

According to the Guidelines, land uses which would be allowed by County should be equal to or more restrictive than those uses allowed by City within a city's

sphere of influence. Before new urban development proceeds, the land should be annexed to City to ensure that the full range of urban services are provided by municipalities. Within "areas of interest" to a City, as here, such development should be allowed only within existing communities.

The Ventura County General Plan, with its discussion of stages of development, may be used as a tool to evaluate proposals for urban development.

As of 1980, City's General Plan designated the subject area for residential development of a maximum of 1,100 units and for a shopping center. On September 15, 1981, County's Open Space Plan designated the subject property as having an "Urban Reserve overlay." This overlay contemplates residential development, but it encourages developers to deal directly with the appropriate city to proceed. County also adopted City's General Plan as the Simi Valley Area Plan (the SVAP) portion of the County's General Plan.

LBE alleges that in adopting the SVAP, the County expressly recognized that the property should be developed with urban uses in the densities stated in the text because: (1) the SVAP showed that over 80 percent of the area's valley floor had already been developed; (2) private and public utility and sewer infrastructure had been extended to meet the needs of the development and is more than adequate to provide service at comfortable levels of safety, adequacy and efficiency; (3) development at the density designated is necessary to meet the residential housing needs of the area and to fulfill the County's regional housing obligations; (4) the County recognized the City's desire that the property be developed as shown in the City's General Plan.

In 1984 LBE purchased the subject 250 acres of land located in unincorporated territory adjacent to and within the "areas of interest" of City.[3]

LBE alleges that before it purchased the property, the City agreed that if LBE submitted a specific plan for 1,100 units, it would be approved. Pursuant to City's request, LBE prepared such a specific plan. It paid all fees for that plan and for an environmental impact report (EIR) on the plan.

The City Council then became the applicant for the specific plan which provided for development of 1,730 units. To accommodate new grading ordinances, the specific plan and a proposed General Plan amendment were modified to reduce the number of units to 1,059 and to eliminate the shopping center.

LBE helped to pay for oversized infrastructure adjacent to its property which could service the development project at the density set forth above. LBE shared in engineering costs for easements it granted. All necessary infrastructure and public services for the projected residents of the property are now in place. LBE asserts that the property could be serviced by county service districts.

In late 1985, City passed an urgency interim ordinance. The ordinance imposed a partial moratorium on providing approval for various land use permits, particularly in hillside areas, until City could review and revise its General Plan. City enacted the ordinance after it monitored development and land use trends in the community. It realized that various land uses then permitted might conflict with proposed revisions to its General Plan. City wanted to consider those uses "in an

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[3] Marr Ranch Associates purchased approximately 2,500 acres in the same area.

atmosphere of land use stability . . . ." LBE alleges that the ordinance "effectively imposed a moratorium on all processing of major new projects" including its own project, "until the City could review and revise its General Plan."

In July 1986, City adopted a temporary growth management plan which would severely limit the number of building permits to be issued annually. The plan takes note of population trends and includes provisions for reevaluation in 1991 based on facts obtained from the 1990 census. Those facts are to be considered in relation to the criteria set forth in the measure, in the revised General Plan and in the County population guidelines. The plan is effective until January 1, 1996.

The plan requires that a developer obtain approval of its proposed project from City, among others, to become eligible for a waiting list to apply for building permits.

The revised City General Plan, adopted in October 1988, designated approximately 325 units for LBE's property. LBE then prepared, but did not file, a tentative map for 249 single family residences to meet the new design criteria of City and County.

City now requires that another specific plan on the entire property be prepared. LBE alleges that this requirement is illegal, and on information and belief alleges that it would take up to 10 years to proceed with the proposed 249-unit development. LBE would be required to complete a specific plan and an EIR, process other required land use applications and get in line to compete with other development applicants for available building permits.

LBE asserts that "[t]he inescapable fate of delay" is clear and that its tremendous carrying costs cannot be overcome. It alleges that its property would diminish in value until it is worth nothing.

Because it "recognized" the "impossibility of developing within the City's jurisdiction, . . ." LBE turned to the County which "foreclosed all development of the Property whatsoever.'

County amended its General Plan on May 24, 1988, allegedly to foreclose LBE's development project. County downzoned much of the property to OS-160 (open space zoning which allows one unit per 160 acres).

Around August 1988, County would not let LBE make application to process the project through County. County told LBE it must first apply for a General Plan amendment and promote the adoption of a new area plan for Simi Valley. LBE alleges it was told that it would take two to three years to adopt a new area plan.

LBE began to seek a General Plan amendment to amend the County General Plan for development of the 250-acre parcel. The County Board of Supervisors considered LBE's prescreening application on January 17, 1989, and denied it, stating that any development of the proposed project must occur in the City after annexation.

The Complaint — The Theory

LBE recites the foregoing allegations to support its seven causes of action. The first is for inverse condemnation. LBE states that City and County's actions in rescinding the area plan, forbidding all development in the urban reserve overlay, downzoning the property, imposing a de facto or actual moratorium (on development) and imposing a growth-control plan to preclude large scale residential development has resulted in a de facto taking in violation of article I, sections 7 and 19 of

the California Constitution and of the Fifth and Fourteenth Amendments to the United States Constitution.

LBE alleges that these actions deprive the subject property of substantially all its value, renders it unmarketable and forbids substantially all reasonable economic beneficial use of the property, thereby thwarting its reasonable investment-backed expectations.

The second cause of action is for denial of substantive and procedural due process. LBE asserts that the defendants have restricted the use of its property to to open space without a legitimate purpose and without evidence to support such action.

The third cause of action alleges denial of equal protection because defendants have limited the use of LBE's property to open space in contrast to uses allowed the owners of comparable properties in the County.

The fourth cause of action seeks relief for deprivation of civil rights under 42 United States Code sections 1983 and 1988. LBE alleges that defendants knowingly and wrongfully deprived it of due process, equal protection and just compensation under the California and federal constitutions under color of state law.

The fifth cause of action is captioned conspiracy to deprive plaintiffs of civil rights. It realleges the various actions of City and County as a pattern of conduct intended to deprive LBE of its legal rights under color of state law.

The sixth cause of action seeks declaratory and injunctive relief as to the rights, duties and obligations among the parties regarding the various actions alleged in the complaint.

Lastly, LBE seeks a writ of mandate under Code of Civil Procedure section 1085 for abuse of discretion by County in acting in the manner described above.

LBE alleges that the City and County have imposed "an ever changing series of obstacles on the development of the Property," and have therefore made "development of the Property a practical impossibility . . . ." Further, LBE alleges it "exhausted all reasonable administrative remedies," and "[f]urther attempts to secure relief through administrative procedures . . . would be totally impractical and futile."

DISCUSSION

To state a cause of action for inverse condemnation, LBE must plead facts which show either that: (1) the application of the general zoning laws to its property does not substantially advance a legitimate state interest; or (2) such laws deprive it of substantially all economically viable use of its land. (*Agins v. Tiburon, supra,* 447 U.S. at p. 260; also see *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825, which refined the first prong of the *Agins* test to require that the regulation advance the precise state interest which avowedly motivated it.)

No precise rule exists to determine when property has been taken by inverse condemnation. (*Agins v. Tiburon, supra,* 447 U.S. at pp. 260-261; *MacDonald, Sommer & Frates v. County of Yolo et al.* (1986) 477 U.S. 340, 348-349.) We start with the proposition that government regulations are presumed to be motivated by and to reasonably serve their avowed purposed. (*First English II, supra,* at p. 1372.) We then weigh the private interest asserted against the public's interest as shown in enactments passed in the exercise of the state's police powers. Where the public benefits greatly, it is constitutional to restrict the use of one's land. (*Id.*, at pp. 1366-1367, fn. 10.) In some cases, no compensation may be required even if almost all uses are taken. (*Id.*, at p. 1366.)

Facial Attack on Legislation

Local government legislation is constitutional on its face if it bears "a substantial relationship to the public welfare . . ." and inflicts no irreparable injury on the landowner. (*Agins v. Tiburon, supra,* 447 U.S. at p. 261; *Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365, 395-397.) This is true even where a substantial diminution in value of the property is alleged. (*Agins, supra,* at p. 261.)

Both County's Guidelines and City's Growth Management Ordinance satisfy this test. The County enacted the Guidelines to promote efficient and effective delivery of community services and to conserve the resources of County by encouraging urban development to occur within cities. The Guidelines emphasize annexation as a means to accomplish these purposes.

City enacted its ordinance "to protect the unique, hill-surrounded environment; enhance the quality of life; promote public health, safety or welfare and the general well-being of the community . . . ." By limiting the rate, distribution, quality and type of residential development on an annual basis, with periodic reviews of the ongoing situation, City seeks "to improve local air quality, reduce traffic demands . . . and ensure that future demands for such essential services as water, sewers and the like are met . . . ."

Courts have long recognized the legitimacy of such ordinances, because such laws are designed to protect the public weal. (See *Agins v. Tiburon, supra,* 447 U.S. at pp. 261-262, citing *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, 129; *Village of Belle Terre v. Boraas* (1974) 416 U.S. 1, 9; *Euclid v. Ambler Realty Co., supra,* 272 U.S. at pp. 394-395.) Courts will not interfere with a municipality's determination of

policy. (*Associated Home Builders Etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 605.)

LBE argues that County and City's actions are designed to thwart LBE's project and that they are contrary to Government Code provisions which support the development of housing, citing Government Code sections 65583, 65580, and 65581. Although these sections promote the development of residential housing, such development is not encouraged when it fails to conserve needed open space and contributes to urban sprawl. (See Gov. Code, § 65560, et seq.)

The state also seeks to assure that open space is conserved wherever possible through open space plans. (Gov. Code, § 65562.) A " '[l]ocal open-space plan' is the open-space element of a county or city general plan . . . ." (Gov. Code, § 65560, subd. (a).) Government Code section 65560, subdivision (b) states that open space is defined to mean, inter alia, "any parcel or area of land . . . essentially unimproved and devoted to an open-space use as defined in this section, and which is designated on a local [or] regional . . . open-space plan as any of the following: . . . (4) Open space for public health and safety, including, but not limited to, areas . . . required for the protection of water quality and . . . areas required for the protection and enhancement of air quality."

The Guidelines and the Growth Management Ordinance express local legislative determinations: 1. to assure that land continues to be available for the use of natural resources (Gov. Code, § 65561, subd. (a)); 2. to discourage premature and unnecessary conversion of open-space land to urban uses and to discourage noncontiguous development patterns (§ 65561, subd. (b)), even though this project is contiguous to developed land; and 3. to preserve valuable open space land by adoption and

strict administration of such ordinances or by other appropriate means (§ 65561, subd. (c)).

The Guidelines substantially advance these goals by encouraging urban development only within cities to asure the efficient and effective delivery of a full range of municipal services. Although the Growth Management Ordinance expressly acknowledges the need for new jobs, improved shopping facilities and housing opportunities for all the residents of the community, it also recognizes the need to limit growth to preserve water and air quality. (See Gov. Code, § 65560, subd. (b)(4).) Such legislative action is well designed to prevent the ill effects of poorly planned urbanization. (*Agins v. Tiburon, supra,* 447 U.S. at p. 261; *First English II, supra,* at p. 1370.)

LBE's allegations state that as of 1980 the City's General Plan slated a portion of the subject property for residential development. LBE also alleged that as of September 1981, the County adopted the City's General Plan as the SVAP which recognized that the property should be developed for urban uses.

That County and City have projected residential and other urban uses for the area in their General Plans does not entitle LBE to develop its land. (*Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785, 795-796; *MacLeod v. Santa Clara County* (9th Cir. 1984) 749 F.2d 541, 548.) The Guidelines and the Growth Management Ordinance provide substantial, legitimate bases for the protection of the public welfare regarding such development. We may not interfere with such policy. (*Associated Home Builders Etc., Inc. v. City of Livermore, supra,* 18 Cal.3d at pp. 604-605.)

LBE acknowledged in its complaint that County's Land Use Plan imposed an urban reserve overlay which encourages developers to deal directly with City so that such development is placed within incorporated cities

whenever and wherever possible, as stated in the Guidelines. The open-space plan maps show this urban reserve overlay as of September 15, 1981.

Ripeness of Attack on Legislation as Applied

An attack on regulatory legislation as applied to a particular parcel of property is not ripe for adjudication in inverse condemnation unless the plaintiff shows that: (1) the regulation has gone so far that it has accomplished a taking, and (2) compensation tendered is not just. (*MacDonald, Sommer & Frates v. County of Yolo et al., supra*, 477 U.S. at p. 348; *Lake Nacimiento Ranch Co. v. San Luis Obispo Cty.* (9th Cir. 1987) 841 F.2d 872, 876.)

LBE bears a heavy burden to show that its "as applied" attack is ripe. LBE must first show that City and County have made a "final and authoritative determination of the type and intensity of development legally permitted on the subject property." (*MacDonald, Sommer & Frates v. County of Yolo et al., supra*, 477 U.S. at p. 348.) "A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." (*Ibid.*)

The developer must establish that it has submitted at least one meaningful application for a development project which has been thoroughly rejected, and that it has prosecuted at least one meaningful application for a zoning variance, or something similar, which has been finally denied. (*Lake Nacimiento Ranch Co. v. San Luis Obispo Cty., supra*, 841 F.2d at pp. 876-877; see also *Williamson Planning Comm'n v. Hamilton Bank* (1985) 473 U.S. 172, 187-188; *Kinzli v. City of Santa Cruz* (9th Cir. 1987) 818 F.2d 1449, 1454, as amended at 830 F.2d 968.) Informal or tentative development proposals are

insufficient to meet these tests. (*Lake Nacimiento, supra*, at p. 876.)

The test is *not* one of exhaustion of a particular administrative remedy — whether the developer has exhausted all administrative appeals regarding a particular application. The developer must show that it has submitted the appropriate applications necessary to proceed with the particular project and that it has received a final rejection of those applications. (*Williamson Planning Comm'n v. Hamilton Bank, supra*, 473 U.S. at pp. 186-190; *Lake Nacimiento Ranch Co. v. San Luis Obispo Cty., supra*, 841 F.2d at pp. 876-877.)

The case of *Kinzli v. City of Santa Cruz, supra*, 818 F.2d 1449, a case similar to the instant one, illustrates how these rules apply.

The Kinzli family owned land adjacent to the City of Santa Cruz for many years. Gradually the property became surrounded by urban development.

Through a stipulated judgment in eminent domain, the city successfully obtained four acres of the property for construction of a public street. The city promised the Kinzlis that they could develop the property with high density uses once the road was built. The city never built the road.

In 1979, the voters passed a slow growth initiative which limited the use of the property to open space until 1990. The measure precluded the city from providing certain urban services in the area in which the property was located.

The city enacted a green belt overlay ordinance to implement the initiative. The ordinance set out the requirements to obtain special use permits and the conditions for extensions of urban services to the greenbelt area. Limited single family and accessory structures could be built upon application for special permits.

High density development, formerly available and sought by the Kinzlis, was forbidden.

The Kinzlis tried to sell the property on the condition that residential building permits could be obtained. One potential buyer abandoned an application he filed on behalf of the Kinzlis because a government staff engineer told him that the city could not provide water to the property. The Kinzlis did not submit applications for other uses.

In 1980, the Kinzlis sued the city charging that the ordinance, and the city's conduct regarding the condemnation proceedings, violated federal constitutional and civil rights and rights under California laws.

At trial, the court discussed the merits of the taking claim and denied it. The appellate court found that the the trial court erred in discussing the merits because the claim was not ripe. Because the Kinzlis had not submitted a "meaningful" development plan or an application for a variance, the appellate court held that the claim should have been dismissed. (See *Kinzli v. City of Santa Cruz, supra*, 818 F.2d at p. 1455.)

Failure to avail oneself of administrative solutions, which might obviate the need to consider constitutional questions, renders a claim for inverse condemnation unripe for adjudication. (*Hodel v. Virginia Surface Min. & Recl. Assn.* (1981) 452 U.S. 264, 297.)

In *MacDonald, Sommer & Frates v. County of Yolo et al., supra*, 477 U.S. 340, the Supreme Court rejected as unripe allegations that a city and county unconstitutionally restricted use of its property to open space when it denied a tentative subdivision tract map to build 159 single and multiple family homes. (Pp. 344, 352, fn. 8.) There, as here, the plaintiff urged that any application for a zone change, a variance or other relief would be futile. Its allegations that all principal and accessory

uses were no longer permitted and that its property had no value were rejected as speculative and conclusional. (*Id.*, at pp. 345, 351, citing *San Diego Gas & Electric Co. v. San Diego* (1981) 450 U.S. 621, 631-632, fn. 12; and *Williamson Planning Comm'n v. Hamilton Bank, supra*, 473 U.S. at pp. 187-188.)

Denial of approvals for a particular and relatively intensive residential development, as here, cannot be equated with a refusal to permit any beneficial use whatsoever. (*MacDonald, Sommer & Frates v. County of Yolo et al., supra*, 477 U.S. at p. 347.)

In the instant case, LBE has not submitted an application for annexation to City even though the Guidelines, since 1969, have urged developers who propose projects like this one to do so. LBE did not follow through on its application for a tentative tract map, nor has LBE alleged that it applied for a zoning change, or sought other favored uses such as senior and affordable housing.

Nevertheless, LBE contends that County has foreclosed all development of its property within County. LBE relies on the following passage from the amended General Plan:

"The Urban Reserve overlay designation is applied to all unincorporated land within a city's adopted Sphere of Influence. Although LAFCO has determined these areas to be appropriate for eventual annexation and urbanization, the Urban designation was not applied to all lands within the LAFCO sphere boundaries because it could result in uban development being permitted without annexation. Accordingly, unincorporated lands within spheres have been designated under this General Plan either as Existing Community, Rural, Agricultural or Open Space. Under these designations, therefore, more intense development could not occur on affected lands until they are annexed."

This language does not foreclose all development, but merely restates County's position since 1969 on annexation. City's Growth Management Ordinance is also a temporary, partial moratorium on certain kinds of development.

If LBE successfully applied for annexation, it could explore other possibilities for development under the Growth Management Ordinance. These possibilities may not reflect what LBE desires to build. This, however, does not constitute an unconstitutional taking. (See *Williamson Planning Comm'n v. Hamilton Bank, supra*, 473 U.S. at pp. 187-188.)

LBE cannot take solace in *First English I, supra*, which stated that damages may be available for temporary total takings. In that case, the California courts assumed that a taking had already occurred. (See *First English I, supra*, at p. 311.) Moreover, *First English I, supra*, was expressly limited to its facts. Said the court: "We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." (*Id.*, at p. 321.) The Supreme Court then remanded the case to the California Supreme Court for further proceedings on the question of whether there had been an unconstitutional taking under the ordinance there in question.

Neither is it " 'clear beyond peradventure . . .' " that the Growth Management Ordinance would result in such excessive delay that it can be assumed that all of the property's beneficial uses have presently been destroyed. (See *Kinzli v. City of Santa Cruz, supra*, 818 F.2d at p. 1454, fn. 5, citing *Norco Construction, Inc. v. King County* (9th Cir. 1986) 801 F.2d 1143, 1145.) The instant temporary ordinance calls for a reevaluation in 1991 of its restrictions, pursuant to the 1990 census and

it automatically expires in 1996. Unless a temporary moratorium is total and is unreasonable in purpose duration or scope, the restrictions it places on development are not compensable. (*First English II, supra*, at pp. 1372-1373.)

In *First English II, supra*, the county enacted a temporary moratorium on building after a flood so that it could conduct a study of the situation. This did not constitute an unconstitutional taking. No taking results when a partial moratorium measure is enacted to protect the public health, safety or morals. (*Id.*, at p. 1362; see also *Associated Home Builders Etc., Inc. v. City of Livermore, supra*, 18 Cal.3d 582.)

Loss of Substantially All Economic Use

The second prong of the *Agins* taking test is whether the regulations deny the property owner substantially all economically viable use of the land. (*Agins v. Tiburon, supra*, 447 U.S. at p. 260.) The meaning of this concept is elusive, but the general rule is that "the existence of permissible uses determines whether a development restriction denies a property holder the economically viable use of its property." (*Lake Nacimiento Ranch Co. v. San Luis Obispo Cty., supra*, 841 F.2d at p. 877, citing cases.)

The denial of the highest and best use does not constitute an unconstitutional taking of the property. (*MacLeod v. Santa Clara County, supra*, 749 F.2d at p. 548.) Even where there is a very substantial diminution in the value of land, there is no taking. (*Id.*, at pp. 547-548, citing *Hadacheck v. Sebastian* (1915) 239 U.S. 394 — diminution in value from $800,000 to $60,000 not a taking; *William C. Haas v. City & Cty. of San Francisco* (9th Cir. 1979) 605 F.2d 1117, 1120 — diminution in value from $2 million to $100,000 not a

taking.) The burden of proof is on the applicant, who faces an uphill battle. (*Lake Nacimiento Ranch Co. v. San Luis Obispo Cty., supra*, 841 F.2d at p. 877.)

In *MacLeod v. Santa Clara County, supra*, 749 F.2d 541, MacLeod purchased cattle grazing property and found it unprofitable. At one time the county granted him a use permit to harvest hardwood, which he also found to be unprofitable. Then, MacLeod attempted to farm the land, which he found infeasible due to irrigation problems.

He then successfully applied to the state for permission to harvest timber. He entered into a contract to sell harvested timber to a third party. County, citing various public health, safety and welfare concerns, denied him a use permit. MacLeod sued for inverse condemnation.

The court, ruling for the county, found that the denial of the permit application did not interfere with other primary objectives: (1) holding the property for investment purposes, and (2) cattle grazing. (*MacLeod v. Santa Clara County, supra*, 749 F.2d at p. 547.)

In *William C. Haas v. City & Cty. of San Francisco, supra*, 605 F.2d 1117, the appellant claimed that rezoning and imposition of other land use restrictions so diminished the value of his investment property that it amounted to a taking. The court disagreed.

On June 28, 1971, Haas contracted to purchase a large unimproved parcel of land in San Francisco. The contract was conditioned on the procurement of a valid site permit for his proposed high-rise development project.

As of July 7, 1971, the date of application for the permit, the property was zoned for the proposed use. Nonetheless, the planning commission denied the permit because the project "would have a detrimental effect on the City as a whole and upon the residents and property of the neighborhood." (*William C. Haas v. City & Cty.*

of San Francisco, supra, 605 F.2d at p. 1119.) The city relied on a recent urban design plan developed for inclusion in the city's master plan.

Haas appealed on August 13, 1971. Two weeks later the commission formally adopted the urban design plan. On August 26, 1971, interim height and bulk restrictions were adopted by the commission, and Haas withdrew the application.

On November 9, 1971, Haas submitted a new plan to the commission to comply with the new height and bulk limitations. The commission approved the application for a site permit on the revised plans, and the board of permit appeals denied a petition for rehearing sought by surrounding residents. Haas then bought the land for $1,650,000, plus various fees. He broke ground and commenced construction.

A neighborhood improvement association filed a writ petition on April 20, 1972, on the ground that Haas failed to comply with the California Environmental Quality Acts of 1970 and 1972. Although he prevailed in the trial court, Haas lost on all appeals. The courts held that he did not state a sufficient claim for a vested right despite the site permit, because he had not undertaken "substantial construction" nor had he incurred substantial liabilities. Haas had to start anew.

By then, however, Haas faced "insurmountable barriers" to the proposed project because the planning commission had adopted a 40-foot height restriction, density controls and had rezoned the property. Haas sued to challenge the rezoning and other land use restrictions on constitutional grounds. He contended that the combined impact of these restrictions destroyed the value of his property investment.

The court held that, as a matter of law, he stated no claim for inverse condemnation. His numerous contentions all rested on the premise that the rezoning and the land use restrictions were so grossly disproportionate in their detriment to him, as opposed to the benefits conceivably inured to the public's general welfare, that they constituted a taking. (*William C. Haas v. City & Cty. of San Francisco, supra*, 605 F.2d at p. 1120.)

The *Haas* court upheld the land use regulations because they were reasonably related to health, safety, morals or general welfare. Such police power regulations are routinely upheld even when they nearly destroy or severely affect recognized real property interests or flatly prohibit the most beneficial use. (*William C. Haas v. City & Cty. of San Francisco, supra*, 605 F.2d at p. 1120.) Although the standard of reasonable relation is lower than that set forth recently by the Supreme Court in *Agins* and *Nollan*, the purposes of a comprehensive plan to decrease population density, to preserve natural resources, and to promote aesthetics are sufficient to support the restrictions which have been enacted here as a matter of law. (*Id.*, at pp. 1120-1121.)

LBE, like Haas, argued it was left with no economically viable use. Even if it were true that LBE's profit may be severely reduced, it would fail to meet the test that there be no viable economic use of the property. This rule holds true even if the zoning restrictions preclude recovery of the initial investment made. (*William C. Haas v. City & Cty. of San Francisco, supra*, 605 F.2d at pp. 1120-1121.)

The restrictions in the Growth Management Ordinance and the open-space zoning designations do not rule out development upon annexation. Although County has downzoned most of the subject property to OS-160 (open-space designation permitting one residential structure per 160 acres of land), LBE may apply for

a zoning change for permissible 10-acre parcels. (And see *Lake Nacimiento Ranch Co. v. San Luis Obispo Cty., supra*, 841 F.2d at p. 877 — government entities need not show the availability of such uses.)

The possibility of obtaining a zoning change or applying for other additional special uses strongly suggests there are other economically beneficial uses not expressly included in such ordinances. (*Lake Nacimiento Ranch Co. v. San Luis Obispo Cty., supra*, 841 F.2d at p. 877.)

Reasonable Investment-Backed Expectations

LBE opines that its reasonable investment-backed expectations (RIBE), to profitably build out a subdivision of homes, has been rendered economically infeasible because of delays caused by the laws and the conduct of defendants.

There is considerable controversy whether courts should consider a landowner's profit expectations in an inverse condemnation action. (See *Lake Nacimiento Ranch Co. v. San Luis Obispo Cty., supra*, 841 F.2d at pp. 877-878, esp. fn. 4, citing *Williamson Planning Comm'n v. Hamilton Bank, supra*, 473 U.S. at pp. 190-191, fn. 12; and cf. *Keystone Coal Association v. DeBenedictis* (1987) 480 U.S. 470, 499.)

Although in some cases it may be a legitimate consideration, here LBE has not stated facts which enable it to proceed on this theory.

Although the developer in *Avco Community Developers, Inc. v. South Coast Regional Com., supra*, 17 Cal.3d 785, spent more than $2 million in building infrastructure and had obtained a final map as well as a permit to complete rough grading, the court concluded that its failure to obtain a permit from the coastal

commission and obtain final building permits left it without a vested interest upon which it could rely. (P. 793.)

The court so held even though it found that the approvals Avco has previously received led Avco to reasonably expect it would be allowed to build without further discretionary approvals. (*Avco Community Developers, Inc. v. South Coast Regional Com., supra,* 17 Cal.3d at p. 790.) Under *Avco,* one cannot obtain a vested right to build in reliance to "the assurances of city officials that construction . . . was permitted, . . ." or on spending large sums for preliminary development costs. (*Id.,* at pp. 792-793.)

In *MacDonald, Sommer & Frates v. County of Yolo et al., supra,* 477 U.S. at page 349, the Supreme Court stated that until the landowner has obtained a final decision regarding the application of zoning and subdivision regulations to his property, it is impossible to know whether the land retains any reasonable beneficial use *or whether his reasonable investment-backed expectations have been destroyed.* LBE has not submitted an application for annexation, much less applied for and obtained an actual building permit. (See also *Agins v. Tiburon, supra,* 447 U.S. at p. 262.)

In *MacLeod v. Santa Clara County, supra,* 749 F.2d 541, the concept of reasonable investment-backed expectations is discussed in conjunction with the *Agins* prongs of vested rights and economic viability. As to the vested rights theory, the court said that although MacLeod had every reason to believe his application (for a county use permit to harvest timber) would be granted, he "must have been aware that the standards and conditions governing the issuance of the permit might cause his application to be denied." (*Id.,* at p. 548.)

On the theory of economic viability, the court said that denial of the permit did not interfere either with holding the property for investment purposes or with the interim, although unprofitable, use of cattle grazing. (*MacLeod v. Santa Clara County, supra*, 749 F.2d at pp. 546-548.) Diminution in expected value, even if that loss is severe, does not constitute a taking. (*Id.*, at p. 548, citing *Hadacheck v. Sebastian, supra*, 239 U.S. 394 — $800,000 investment became worth $60,000; and *William C. Haas v. City & Cty. of San Francisco, supra*, 605 F.2d at p. 1120 — $2 million investment became worth $100,000.)

As here, the gravamen of MacLeod's contention was that a taking requiring compensation occurred "because he has been denied the opportunity to exploit his property by pursuing particular project he had come to believe would be available for development. This argument fails." (*MacLeod v. Santa Clara County, supra*, 749 F.2d at p. 548; see esp. *William C. Haas v. City & Cty. of San Francisco, supra*, 605 F.2d at pp. 1120-1121; and also *MacDonald, Sommer & Frates v. County of Yolo et al., supra*, 477 U.S. at p. 347.)

" '[The] [p]rediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. . . .' " (*MacLeod v. Santa Clara County, supra*, 749 F.2d at p. 548, quoting *Andrus v. Allard* (1979) 444 U.S. 51, 66; and see *Hodel v. Virginia Surface Min. & Recl. Assn., supra*, 452 U.S. at pp. 296-297.) Since *Penn Central Transp. Co. v. New York City, supra*, 438 U.S. 104, the Supreme Court has rejected such arguments as " 'quite simply untenable.' " (*MacLeod, supra*, at p. 548, quoting *Penn Central, supra*, at p. 130.) The Fifth Amendment "is not a panacea for less-than-perfect investment or business opportunities." (*Id.*, at p. 549.)

Regardless of how we analyze RIBE, we come up with the same conclusion — LBE has not stated facts which support recovery for inverse condemnation as a matter of law.

Due Process

LBE's due process allegations are conclusional and premature. (*Kinzli v. City of Santa Cruz, supra*, 818 F.2d at p. 1456, citing the Supreme Court in *Williamson Planning Comm'n v. Hamilton Bank, supra*, 473 U.S. at p. 199.)

Even if a Fifth Amendment takings claim could arguably be recast as one sounding in substantive due process, it would be premature. (*Kinzli v. City of Santa Cruz, supra*, 818 F.2d at p. 1456.) And, there can be no denial of procedural due process, under the Fourteenth Amendment, until the substantive due process claim is ripe. (*Ibid.*)

An ordinance that is reasonable related to the public welfare of the population it significantly affects is constitutional. (*Associated Home Builders Etc., Inc. v. City of Livermore, supra*, 18 Cal.3d at pp. 606-607; also see *McMillan v. Goleta Water Dist.* (9th Cir. 1986) 792 F.2d 1453, 1457.) The Guidelines and the Growth Management Ordinance are reasonably related to the public welfare.

Equal Protection

LBE alleges that defendants have arbitrarily set aside its property as open space, whereas comparable property in the County has not been similarly restricted.

Absent the allegation of the invasion of fundamental rights or the existence of a suspect classification, there is no violation of equal protection unless the classification bears no rational relationship to a legitimate state interest. (*McMillan v. Goleta Water Dist., supra*, 792 F.2d at p. 1456; *Pennell v. San Jose* (1988) 485 U.S. 1, 14, citing *Vance v. Bradley* (1979) 440 U.S. 93.) This is true even if some discrimination is alleged. (*McMillan, supra*, at p. 1456.)

As with the due process cause of action, the claim here is not ripe. LBE's second amended complaint, proffered as a motion for reconsideration, provided more specific allegations concerning owners of other property who have allegedly been treated more equitably. Even if the trial court had allowed the second amended complaint to be filed, it would still be subject to demurrer absent LBE's filing a proper application.

Civil Rights

LBE's allegation that it has been deprived of due process, equal protection and just compensation in inverse condemnation under color of state law, pursuant to title 42 United States Code sections 1983 and 1988, is not ripe because there has been no final decision on meaningful applications. (See *Williamson Planning Comm'n v. Hamilton Bank, supra*, 473 U.S. at pp. 187-188.)

Conspiracy

LBE alleges a conspiracy among the defendants to perform the activities previously alleged. There is no separate cause of action for civil conspiracy apart from overt acts done in furtherance of activities which are legally compensable. (*Widdows v. Koch* (1968) 263 Cal.App.2d 228, 234; and see *Escamilla v. City of Santa Ana* (C.D.Cal. 1985) 606 F.Supp. 928, regarding 42 U.S.C. §1983 allegations.) Because we find LBE has not alleged any actionable activities, we hold that there is no actionable conspiracy.

Relief by Writ, Injunction and Declaratory Relief

Because there is no basis in law or equity to grant relief under the facts alleged, there is no ground upon which we can grant relief by way of writ, injunction or declaration.

LBE has sued City and County because of disappointed expectations concerning its development plans. LBE states no cause of action even if it has expended substantial sums on infrastructure and preapproval planning, and even though there will be some delay in bringing some development proposal to fruition. These expenditures and delays are the normal incidents of development projects and are not actionable, per se.

We affirm the judgment as to County.

As to City's petition, let a writ of mandate issue to compel the trial court to enter a new and different order sustaining City's demurrer in its entirety without leave to amend. Costs to City and County.

CERTIFIED FOR PUBLICATION

GILBERT, Acting P.J.

We concur:

YEGAN, J.

ABBE, J.*

* Retired Associate Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

Bruce A. Thompson, Judge
Superior Court County of Ventura

Hamilton & Samuels and Paul R. Hamilton, Karen J. Lee and Deborah M. Rosenthal, for Plaintiff, Appellant and Real Party in Interest Long Beach Equities, Inc.

James L. McBride, County Counsel, Dennis L. Slivinski, Assistant County Counsel, for Defendant and Respondent, County of Ventura.

John Torrance, City Attorney, Marjorie Baxter, Assistant City Attorney; Freilich, Stone, Leitner & Carlisle and Katherine E. Stone and Margaret A. Sohagi, for Defendants, Respondents, and Petitioners City of Simi Valley and City Council of The City of Simi Valley.

No appearance for Respondent Superior Court of the County of Ventura.

Baker & McKenzie and Robert H. Philibosian, for Real Party in Interest Marr Ranch Associates, Inc.

Burke, Williams & Sorensen and J. Robert Flandrick, Virginia R. Pesola as Amici Curiae on behalf of Petitioner City of Simi Valley.

Pacific Legal Foundation and Ronald A. Zumbrun, Edward J. Connor, Jr., Timothy V. Kassouni as Amici Curiae on behalf of Real Party in Interest Long Beach Equities, Inc.

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
ROBERT N. WILSON, CLERK

DIVISION: 6

Hamilton & Samuels
Karen J. Lee
4000 Macarthur Blvd.
Suite 5700
Newport Beach, CA. 92660

RE: Long Beach Equities, Inc.
VS.
Ventura, County of

2 Civil B045047
Ventura No 103364

EXHIBIT D

CERTIFIED FOR PUBLICATION
[NO CHANGE IN JUDGMENT]

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

COURT OF APPEAL-SECOND DIST.
FILED
JUL 25 1991
ROBERT N. WILSON, Clerk

Deputy Clerk

LONG BEACH EQUITIES, INC., etc.,
Plaintiff and Appellant,
v.
COUNTY OF VENTURA, et al.,
Defendants and Respondents.

2d Civil No. B045047
(Super. Ct. No. 103364)
(Ventura County)

THE CITY OF SIMI VALLEY, et al.,
Petitioners,
v.
SUPERIOR COURT OF THE
COUNTY OF VENTURA,
Respondent.

LONG BEACH EQUITIES, INC., et al.,
Real Parties in Interest.

No. B046558

ORDER MODIFYING OPINION AND DENYING REHEARING

THE COURT:

It is ordered that the opinion on rehearing filed herein on June 27, 1991, be modified in the following particulars:

1. On page 25, lines 3 and 4, delete the words "tentative tract map" and replace them with the following words: "specific plan".

There is no change in the judgment.

Long Beach Equities, Inc.'s petition for rehearing is denied.

EXHIBIT E

Second Appellate District,
Division Six,
No. B045047 / BO46558
S022332

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
FILED
SEP 26 1991
Robert Wandruff, Clerk

Deputy

LONG BEACH EQUITIES INC.,
Appellant
v.
COUNTY OF VENTURA Et Al.,
Respondents

And Companion Cases

Petition for review DENIED.

The request for an order directing depublication of the opinion is denied.

LUCAS
Chief Justice

EXHIBIT F

SUPERIOR COURT OF CALIFORNIA
COUNTY OF VENTURA

F I L E D
JUNE 30 1989
Richard D. Dean, County Clerk

Deputy

LONG BEACH EQUITIES, INC., a California corporation; MARR RANCH ASSOCIATES, INC., a California corporation,
Petitioners and Plaintiffs,

vs.

COUNTY OF VENTURA; BOARD OF SUPERVISORS OF THE COUNTY OF VENTURA; PLANNING COMMISSION FOR THE COUNTY OF VENTURA; THE CITY OF SIMI VALLEY; THE CITY COUNCIL OF THE CITY OF SIMI VALLEY, DOES 3 through 50,
Respondents and Defendants.

No. 103364

JUDGMENT FOLLOWING THE COURT'S SUSTAINING WITHOUT LEAVE TO AMEND THE DEMURRER OF THE COUNTY OF VENTURA, THE BOARD OF SUPERVISORS OF THE COUNTY OF VENTURA, AND THE PLANNING COMMISSION FOR THE COUNTY OF VENTURA TO THE FIRST AMENDED PETITION FOR WRIT OF MANDATE AND AMENDED COMPLAINT AND SUPPLEMENTAL COMPLAINT

On May 5 and May 25, 1989, there came on for hearing in courtroom 44 of the above-entitled court the demurrer of the County of Ventura, the Board of Supervisors of the County of Ventura, and the Planning Commission for the County of Ventura to the First Amended Petition for Writ of Mandate and Amended Complaint and Supplemental Complaint. Dennis L. Slivinski, Assistant County Counsel, appeared on behalf of the demurring parties. Paul R. Hamilton and Karen J. Lee of Hamilton and Samuels appeared on behalf of Long Beach Equities, Inc., and Robert H. Philibosian of Baker and McKenzie appeared on behalf of Marr Ranch Associates, Inc. Marjorie Baxter, Assistant City Attorney for the City of Simi Valley, and Deborah J. Fox and Katherine E. Stone of Freilich, Stone, Leitner & Carlisle announced that they were appearing as observers on behalf of the City of Simi Valley and the City Council of the City of Simi Valley.

The court read and considered respondents' demurrer to the first amended petition and memorandum of points and authorities in support thereof, petitioners' memorandum of points and authorities in opposition to defendants' demurrer, respondents' reply, petitioners' supplemental opposition and respondents' supplemental reply. The court also heard and considered oral argument of counsel.

The court has taken judicial notice of the following documents:

1. Resolutions of the Ventura County Board of Supervisors of August 12, 1969; March 30, 1976; and February 12, 1985, adopting the Guidelines for Orderly Development.

2. The land use maps dated September 15, 1981; April 17, 1984; and May 24, 1988, showing the property which is the subject of this litigation to be designated Open Space. The outline of the subject property appear-

ing on the certified copies of the land use maps is based on the diagram on the aerial photograph attached as Exhibit A to the First Amended Petition/Complaint. Counsel have stipulated that the clearer copies of these maps are found at Exhibit 2 of the First Request for Judicial Notice filed November 28, 1988.

3. A map based on official Assessor's parcel maps of the subject property showing current zoning adopted by the Ventura County Board of Supervisors.

4. Ventura County Ordinance Code sections 8105-0 to and including 8105-4.

5. Resolution of the Ventura County Board of Supervisors, dated March 3, 1970, designating the governing body of the City of Simi Valley as the Board of Directors of the Simi Valley County Sanitation District.

6. Resolution of the Ventura County Board of Supervisors, dated June 14, 1977, designating the governing body of the City of Simi Valley as the governing body of the Ventura County Waterworks District No. 8.

7. Maps showing the boundaries of Ventura County Waterworks District No. 8 and Simi Valley County Sanitation District.

8. A staff report regarding Parcel Map Waiver No. 98 and a Notice of Approval of Parcel Map Waiver, three pages of the June 1987 Land Use Element of the Ventura County General Plan, Resolution No. 222 of the Board of Supervisors and seven pages of the City of Simi Valley's General Plan. These four items were attached as Exhibits A through D to petitioners' supplemental opposition to the demurrer filed May 4, 1989.

9. The form and content section of the Ventura County General Plan Land Use Element attached as Exhibit 1 to the respondents' supplemental reply filed May 15, 1989.

Based on material facts alleged in the First Amended Petition, which the court has assumed to be true for purposes of ruling on the demurrer, and on the matters of which the court has taken judicial notice, the court sustains the demurrer without leave to amend as to all alleged causes of action on the ground that they do not allege facts sufficient to constitute a cause of action against the demurring defendants/respondents.

With regard of the alleged denial of equal protection, the court has considered the representations of counsel for petitioners that he would amend to allege several developments approved in the unincorporated area which have features similar to petitioners' proposed development, such as Lake Sherwood, Rancho Matilija, Oak Park, and the proposed Franciscan project. However, the addition of these alleged similarities would not be sufficient to overcome a significant difference in that petitioners' proposed development would be provided urban services, particularly sewer and water, from entities under the jurisdiction and control of the City Council of the City of Simi Valley. This, in the court's view, is a sufficient rational basis to require annexation as a condition of the development of petitioners' project.

Having sustained the demurrer without leave to amend as to all alleged seven causes of action of the First Amended Petition, the court hereby dismisses the First Amended Petition for Writ of Mandate and Amended Complaint and Supplemental Complaint as to the defendants County of Ventura, Board of Supervisors of the County of Ventura and the Planning Commission for the County of Ventura.

IT IS SO ORDERED.

Dated JUN 30 1989

/s/ Bruce A. Thompson

Judge of the Superior Court

John Torrance, City Attorney
Marjorie A. Baxter
Assistant City Atatorney
City of Simi Valley
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Deborah J. Fox
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Los Angeles, California 90025
(213) 444 7805
Attorneys for Respondents / Defendants
City of Simi Valley, et al.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF VENTURA

F I L E D
NOV 22 1989
Sheila Gonzalez, Superior Court
Executive Officer and Clerk
By _____, Deputy

LONG BEACH EQUITIES, INC., a California corporation; MARR RANCH ASSOCIATES, INC., a California corporation,
Petitioners and Plaintiffs,

vs.

COUNTY OF VENTURA; BOARD OF SUPERVISORS OF THE COUNTY OF VENTURA; PLANNING COMMISSION OF THE COUNTY OF VENTURA; THE CITY OF SIMI VALLEY; THE CITY COUNCIL OF THE CITY OF SIMI VALLEY, DOES 3 through 50,
Respondents and Defendants.

CASE NO. 103364

ORDER RE CITY'S DEMURRER TO
FIRST AMENDED PETITION AND COMPLAINT

CITY OF SIMI VALLEY and CITY COUNCIL OF SIMI VALLEY'S ("City's") demurrer to the first amended petition and complaint came on for hearing on October 26, 1989 before the Honorable Bruce A. Thompson, Judge of the Superior Court, Marjorie Baxter, Assistant City Attorney, and Freilich, Stone, Leitner & Carlisle by Katherine E. Stone appearing for defendant and moving party City; Hamilton and Samuels, Karen J. Lee appearing for plaintiff Long Beach Equities; no appearance for plaintiff Marr Ranch Associates.

The court having reviewed the papers submitted, taken judicial notice of the documents submitted by the City, and considered the arguments of counsel rules, and orders as follows:

1. The demurrer is sustained without leave to amend as to the third (Discrimination in Application in Zoning and Land Regulation, Denial of Equal Protection of Law), fourth (Deprivation of Civil Rights) and fifth (Conspiracy to Deprive Plaintiffs of Civil Rights) causes of action and the third, fourth and fifth causes of action are hereby dismissed.

2. The seventh cause of action (Petition for Writ of Mandate Against County Defendants) is not applicable to the City. The demurrer of the County defendants having been previously sustained without leave to amend the seventh cause of action is hereby dismissed.

3. The demurrer is overruled as to the first (Inverse Condemnation), second (Denial of Substantive and Procedural Due Process of Law) and sixth (Declaratory and Injunctive Relief) causes of action.

4. City defendants to answer on or before November 17, 1989.

Dated: NOV 22 1989

BRUCE A. THOMPSON

BRUCE A. THOMPSON
Judge of the Superior Court

Supreme Court, U.S.
FILED
JAN 17 1992
OFFICE OF THE CLERK

(2)

No. 91-1076

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

LONG BEACH EQUITIES, INC.,

Petitioner,

v.

COUNTY OF VENTURA, CALIFORNIA, and
CITY OF SIMI VALLEY, CALIFORNIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION SIX

OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The central question concerning the County of Ventura, the Ventura County Board of Supervisors, and the Ventura County Planning Commission (collectively referred to as "County") is whether local government acts within the permissible scope of its police power, and without liability for inverse condemnation damages, if it requires annexation as a condition of urban development.

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STATEMENT OF THE CASE

Summary Analysis of Question Presented

Petitioner claims that the County of Ventura has violated its rights under the Fourteenth Amendment of the United States Constitution and has taken property for public use without just compensation because the County of Ventura insists on applying to petitioner the County of Ventura's Guidelines for Orderly Development, in place since 1969, which affirmatively encourage annexation to adjacent cities of property slated for urban development.

Petitioner believes that the County of Ventura can properly comply with the United States Constitution only if it processes and approves within the unincorporated area a high density urban development consisting of 249 units on the 250-acre parcel owned by Long Beach

Equities since 1984. Petitioner also insists that the approval process be undertaken forthwith at a timetable not clearly specified consistent with petitioner's investment expectations.

The County of Ventura submits that the application of its regulations to petitioner, which basically amount to the requirement that annexation to the adjacent City of Simi Valley take place as a condition of the proposed urban development, comports with the traditional interpretation of this Court's opinion in Agins v. City of Tiburon (1980) 447 U.S. 255 requiring that constitutionally permissible regulations substantially advance legitimate state interests and not deny economically viable use of the regulated land.

Although the notion of "reasonable investment-backed expectations" has not

been reduced to a set formula the analysis already provided by this Court provides a sufficient basis to conclude that the County of Ventura did not deny the reasonable investment-backed expectations of Long Beach Equities.

Facts of This Case

Long Beach Equities alleges a constitutional violation because the County of Ventura insisted upon annexation of petitioner's property so that the high density, 249-unit development on approximately 250 acres would take place under the jurisdiction of the City of Simi Valley physically contiguous to petitioner's property which is within the sphere of influence and area of interest of the City, and within the sphere boundaries of sewer and water districts

under the exclusive control of the City Council of the City of Simi Valley.

At the outset of the project, petitioner recognized that annexation to the City of Simi Valley would be required both by City and County policy, and proceeded to design the development consistent with City development standards. (Petition for Writ of Certiorari, pp. 2-3; C.T. 764-765, ¶ 13 ("C.T." refers to the Clerk's Transcript on appeal.) Working under the assumption that annexation would be required, representatives of Long Beach Equities worked together with officials from the City of Simi Valley to do preparatory work for the project, including the development of a specific plan.

Although the property was located within the unincorporated area of the County of Ventura, petitioner knew that

the residential densities were inconsistent with the open space element of the Ventura County General Plan. Since 1981, three years before Long Beach Equities purchased the property, the property was designated as open space in the Ventura County General Plan, remained so designated throughout all times alleged in the complaint, and is so designated now. (C.T. pp. 226-228.)

California Government Code section 65567, enacted in 1970, would have required the County of Ventura to deny petitioner's proposed high-density residential development within the jurisdiction of the County because it was in 1984, and still is, inconsistent with the County's open space plan. The urban reserve overlay placed on the property (C.T. p. 145, ¶ 21; C.T. pp. 226-227) emphasizes the County's intention to

apply its Guidelines for Orderly Development, in place since 1969, (C.T. pp. 207-224) which would require annexation if the subject property were to develop as appellant requests.

At the time of purchase, petitioner also knew that the 250-acre parcel was within the City's sphere of influence and area of interest. (C.T. p. 139, ¶ 4; p. 144, ¶ 18.) Petitioner also knew that the water and sewer districts which would likely serve the subject property, the Simi Valley County Sanitation District and Waterworks District No. 8, have been governed by the City Council of the City of Simi Valley since 1970 and 1977, respectively. (C.T. p. 150, ¶ 36; pp. 238-245.)

Petitioner never obtained from the City or the County building permits or other final discretionary approval

sufficient to obtain vested rights to proceed with the particular development before the City adopted a growth management ordinance in late 1985, which petitioner claims, based on a subjective assessment, will cause an unacceptable delay in processing its development, rendering the development "economically infeasible."

The County reaffirmed its policy decision to require annexation in this particular case. On May 24, 1988, as part of a General Plan amendment, the Ventura County Board of Supervisors ("Board") rescinded the Simi Valley area plan applicable to a portion of the subject property, zoned most of the subject property OS-160 (C.T. p. 143, ¶ 14) and continued the urban reserve overlay already in place on the subject property since April 1984 (C.T. p. 227).

The balance of the Marr Ranch property is zoned A-E, allowing for a 40-acre minimum. (C.T. p. 230.) Since 1981, the subject property was designated open space on the General Plan, which would permit zoning for minimum lot sizes of 10 acres.

These actions of the Board were in keeping with the County's commitment to its Guidelines for Orderly Development, in place since 1969, which affirmatively encourage high density development within cities especially when the property at issue is within a city's sphere of influence and area of interest. The urban reserve overlay placed on properties the Board considers to be appropriate for eventual annexation and urbanization underscores their importance. Although the Board's actions of May 24, 1988, do emphasize and reaffirm

the Board's policy that the subject property be annexed before being developed with the type of intensity proposed by petitioner, this policy was assured, at least since 1981, by means of the open space designation applicable to the subject property. (C.T. pp. 226, 227, 228.)

In March 1985, Long Beach Equities first experienced a direct application of the County's annexation policy when it applied for a parcel map waiver for a subdivision into two separate lots. (C.T. pp. 697-700.) The staff report noted that the proposed residential project would not take place until annexation to the City of Simi Valley. (C.T. p. 698, § 2.) In addition to Government Code section 65567, which precludes urban development inconsistent with the open space plan, the County's

General Plan provided "[i]n the event that the Open Space Element differs with an area plan, the more restrictive designation/policy applies." (C.T. pp. 701-712, 724.)

Sometime in July or August 1988, Long Beach Equities abandoned its earlier plan to develop within the City's jurisdiction and requested an application to process the 249-unit project in the County's jurisdiction. (C.T. pp. 153-154, ¶ 44.) County staff allegedly refused to supply the tentative map application absent an application by Long Beach Equities also for a General Plan amendment first requiring a prescreening (C.T. 154, ¶¶ 44.1-44.3), which is logical given the County land use policies already in place. The County could not legally approve the Long Beach development absent a radical General Plan amendment.

Eventually Long Beach followed the appropriate procedure and filed a pre-screening application to amend the County's General Plan to permit development of the 250-acre parcel at a density of approximately one unit per one acre. (C.T. p. 154, ¶ 45.) The County denied the application, reaffirming that development of this density must occur within the City. (C.T. p. 155, ¶¶ 45.2, 45.6.)

Ultimately, Long Beach did file a tentative map application with the County. (C.T. pp. 246-251.) However, Long Beach does not allege any applications for a zone change to a higher density permitted under the open space designation, such as one unit per 10 acres, or any applications to develop the property within the County's jurisdiction consistent with the existing zoning and

General Plan, which allows for several uses including residential. (C.T. pp. 230-237.) Nor did Long Beach ever file a petition to annex the property to the City of Simi Valley or make any development application with the City.

The County and the City both recognize the reasonableness of having property which is a logical extension of the City actually develop within the City's jurisdiction. Based on this shared view of land use policy the County has encouraged Long Beach Equities to develop a project consistent with the City's requirements because the City would ultimately govern the development. Long Beach Equities willingly cooperated with this policy until they concluded that it would not suit their own development timetable.

What was once accepted by Long Beach Equities as a cooperative endeavor between City and County to foster orderly urban development is now labeled an illegal conspiracy. Instead of applying for annexation through the Local Agency Formation Commission and other appropriate agencies and making an application to the City for a development permit, which Long Beach Equities recognized to be the appropriate course when it purchased the property, Long Beach Equities chose litigation to undermine legislative policy.

ARGUMENT

I

THE COUNTY'S GUIDELINES FOR ORDERLY DEVELOPMENT SUBSTANTIALLY ADVANCE A LEGITIMATE STATE INTEREST AND DO NOT DENY THE ECONOMICALLY VIABLE USE OF LONG BEACH EQUITIES' PROPERTY

The Court of Appeal's decision upholding the legitimacy of the County's Guidelines for Orderly Development is consistent with existing state and federal cases supporting the conclusion that such regulation does not constitute a regulatory taking within the meaning of Agins v. City of Tiburon (1980), 447 U.S. 255.

At stake here is the County of Ventura's Guidelines for Orderly Development, in place since 1969, which affirmatively encourage annexation to adjacent

cities of property slated for urban development, instead of the creation of new urban communities adjacent to existing cities but under County jurisdiction. This policy is especially appropriate in circumstances such as here where the development area is physically contiguous with and in the sphere of influence and area of interest of the City of Simi Valley.

The Guidelines, of which the Court took judicial notice (Exhibit C, p. 3-5, Exhibit F, p. 2 to Petition for Writ of Certiorari), advance the legitimate state interest of locating urban development in cities which promotes the efficient and effective delivery of community services, the conservation of County resources and orderly pattern of development, precludes the premature conversion of open space, and assures that urban communities

physically contiguous to adjacent cities have political control through the voting process over the city officials directly responsible for providing urban services and community planning.

The County's Guidelines, as well as the city's growth management ordinance, do not deny economically viable use of the 250 acres at issue, which are ultimately suitable for urban development. The city's General Plan considers the area appropriate for residential development in the density requested by the developer. The County's Open Space Plan designates the area as open space with an urban reserve overlay which contemplates residential development consistent with the city's development standards after annexation to the city. Hence, the very use which petitioner requests is not only

not precluded, it is affirmatively encouraged.

The analysis of whether a land use regulation substantially advances a legitimate state interest must carefully distinguish the state interest, which is a matter of legislative policy to which the courts defer absent arbitrary action, from the regulations implementing the state interest which must substantially advance those interests. (Agins, supra, 447 U.S. 255; Nollan v. California Coastal Com'n. (1987) 483 U.S. 825, 841.) Here, the open space general plan designation, together with the urban reserve overlay and annexation requirement, indisputably advance the legitimate state interest of requiring that urban development take place in cities, which in turn promotes the conservation of County resources, the efficient and effective

delivery of community services and orderly patterns of development.

The legislation of that policy in the first instance is to be accorded the traditional deferential test which recognizes that the Legislature may properly determine the public goals and purposes. (Hawaii Housing Authority v. Midkiff (1984) 467 U.S. 229, 242-243.) The means implementing the legislative goals, here the general plan and Guidelines for Orderly Development, must be such that they substantially advance the legitimate state interest or policy. Judicial review of the rationality of the state's exercise of its police power concerns only whether the state could rationally have decided that the adopted measures achieve the state's objective. (Nollan, supra, 483 U.S. at 843-844.)

By placing the open space designation in the general plan, together with the requirement of California Government Code section 65567 and the annexation requirement, the local Legislature has assured that its interest of having urban development take place in cities will be effectuated. It has already been determined that the use of the general plan to implement orderly urban growth substantially advances a legitimate state interest (Agins, supra, 447 U.S. at 262) and that it is a proper exercise of the police power to organize urban development by means of various general planning tools. (Nollan, supra, at pp. 835-836).

Long Beach Equities' real quarrel is not with the implementing legislation but with the initial adoption of the state interest. They simply do not agree with the policy that urban development should

take place within the jurisdiction of the city, at least in cases where adjacent city regulations do not suit their interest. Once this is recognized, it becomes clear that petitioner really wants this Court to assume the legislative function of making land use policy. However, this Court has made it clear that debates over the wisdom of socio-economic legislation are not to be carried out in the federal courts. Where the Legislature's purpose is legitimate and its means are not irrational deference to the legislative decision is the traditional course of action. (Midkiff, supra, 467 U.S. at p. 243.)

II

REASONABLE INVESTMENT-BACKED EXPECTATIONS ARE A FUNCTION OF EXISTING ENTITLEMENTS AND REASONABLY FORESEEABLE DEVELOPMENT CONDITIONS, NOT SUBJECTIVE EXPECTATIONS

No case affirmatively holds that reasonable investment-backed expectations is a third prong to the Agins test for a regulatory taking: Whether the regulation substantially advances a legitimate state interest or denies an owner economically viable use of his land.

The concept of reasonable investment-backed expectations has been noted in the taking cases, but as part of an analysis of whether an individual had an underlying entitlement which could be said to be taken by a given regulation. For example, in Kaiser Aetna v. United States

(1979) 444 U.S. 164, at page 180, the court held that the government's creation of a public right of access to an improved pond constituted a taking. In reaching that conclusion the court relied on Hawaii law which considered the pond to be private property and not part of a navigable stream, which the courts traditionally have recognized as being incapable of private ownership. Having determined the underlying entitlement of the owners to use the pond as private property not subject to navigation easements, the court concluded that imposition of the navigation servitude would result in an actual physical invasion of a privately owned marina. (Id. at pp. 179-180.)

In Ruckelshaus v. Monsanto Co. (1984) 467 U.S. 986, the court noted that disclosure by the government of trade

secrets might constitute a taking of Monsanto's property interest in the research data submitted to the EPA because there was an "explicit governmental guarantee" that such information would not be released. Monsanto's designation of the information as trade secrets plus the government's explicit guarantee of nondisclosure formed the basis of a reasonable investment-backed expectation. (Id. at pp. 1010-1011.)

The notion of reasonable investment-backed expectations does not do away with the well-established principle that the hallmark of property is an individual entitlement grounded in some independent source consisting of rules and understandings such as state law. (Logan v. Zimmerman Brush Co. (1982) 455 U.S. 422,

430; Board of Regents of State Colleges v. Roth (1972) 408 U.S. 564, 577.)

Under California law, a developer has a right to proceed with a particular development plan only after having obtained all necessary government permits and expended substantial sums in reliance thereon. (Billings v. California Coastal Com. (1980) 103 Cal.App.3d 729, 735-736; Avco Community Developers, Inc. v. South Coast Regional Comm. (1976) 17 Cal.3d 785, 791-798.) A developer may also acquire such a right to develop in a particular way by means of a developer agreement (Cal. Gov. Code, § 65864 et seq.) or a vesting tentative map (Cal. Gov. Code, § 66498.1-66498.9).

Long Beach Equities does not have any specific entitlement necessary to support a reasonable investment-backed expectation to develop without meeting the

County's annexation policy. They have not acquired explicit guarantees in the form of a developer agreement nor expended substantial sums in reliance on a building permit or its functional equivalent. Moreover, in this case, the record is clear that Long Beach Equities fully expected to follow County policy. Therefore, both as a matter of law and based on undisputed facts in the record, Long Beach Equities could not reasonably have expected to develop within the unincorporated area at the proposed urban densities without annexation.

The concept of reasonable investment-backed expectations also includes the notion of foreseeable regulation. In Connolly v. Pension Ben. Guar. Corp. (1986) 475 U.S. 211, 228, the court observed that those who do business in a regulated field cannot object if the

legislative scheme is buttressed by subsequent amendments to achieve certain legislative ends. A fortiori, a developer cannot reasonably expect county government to make radical changes in its land use policy in effect at the time the property was purchased simply to accommodate a developer's building timetable.

In Kirby Forest Industries, Inc. v. United States (1984) 467 U.S. 1, at page 14, the court explained the principle underlying distinct investment-backed expectations as follows:

> "The principle that underlies this doctrine is that, while most burdens consequent upon government action undertaken in the public interest must be borne by individual landowners

> as concomitants of 'the advantage of living and doing business in a civilized community' [fn.] some are so substantial and unforeseeable, and can so easily be identified and redistributed, that 'justice and fairness' require that they be borne by the public as a whole."

Petitioner can hardly claim that the County's annexation requirement was unforeseeable in this case since it had been in place since 1969, implemented as to the subject property by its open space plan in place since 1981, and underscored by the urban reserve overlay designation on the subject property. Petitioner not only foresaw this regulation but, at the outset of the development process, sought to comply with it by working with the

City to design the development consistent with City standards with the understanding that the property would be annexed and ultimately subject to the City's jurisdiction.

CONCLUSION

Therefore, it is respectfully requested that the petition for writ of certiorari be denied. The Court of Appeal's decision follows traditional and well-established legal principles announced by this Court which support the County's regulatory role under these circumstances.

Dated: January 9, 1992

Respectfully submitted,

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Supreme Court, U.S.
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LONG BEACH EQUITIES, INC.,

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BRIEF OF RESPONDENT CITY OF SIMI VALLEY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions framed by the petitioner seriously misstate the facts of this case; the questions are more properly stated below.

1. Whether the City of Simi Valley's land use regulations which permit development of approximately three hundred twenty-five (325) residential units on petitioner's two hundred fifty (250) acres are facially unconstitutional.

2. Whether petitioner's *as applied* claims are ripe for judicial review where petitioner never applied to annex to or develop in the City.

Another issue briefed, but not addressed by the lower courts is:

3. Whether petitioner's *facial* claims are barred by statutes of limitation.

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BRIEF OF RESPONDENT CITY OF SIMI VALLEY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

There are no special and important reasons for granting review in this case, and the petition materially misstates the facts, and misrepresents the law decided by the state courts.

OPINIONS BELOW

The petition fails to disclose that following the decision of the California Court of Appeal, granting the City of Simi Valley's ("City") petition for a writ of mandate, the remittitur was issued on October 1, 1991 and the trial court entered judgment in favor of the City on December 2, 1991. (Appendix 1.) Petitioner has not appealed this judgment to the state appellate courts.

JURISDICTION

Jurisdiction is lacking because:

1 The *as applied* claims are not ripe for judicial review; and

2 The petitioner has not exhausted its state court appeals from the trial court's judgment entered January 3, 1992.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The City's growth management ordinance, Ordinance No. 638 is Appendix 3.

STATEMENT OF THE CASE

A. Procedural History.

The state courts decided this case on the complaint and matters of which it may and did take judicial notice.[1] The demurrer of the County of Ventura ("County") was sustained by the trial court and an appeal taken. The demurrer of the City was sustained in part and overruled in part by the trial court. The California Court of Appeal granted the City's petition for an extraordinary writ to review the overruling of the City's demurrer to certain causes of action.[2] After the Court of Appeal issued its final opinion (Petition, Appendix D) and the California Supreme Court denied review (Petition, Appendix E), the remittitur issued from the Court of Appeal to the trial court and judgment was entered on January 3, 1992 (Appendix 1). Petitioner has not exhausted its state court appeals from this judgment.

B. Statement Of The Facts.

In 1969 the County of Ventura adopted annexation policies (the Guidelines for Orderly Development) which

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[1] California Evidence Code §§ 452-453; California Code of Civil Procedure § 430.30; *see Agins v. Tiburon*, 447 U.S. 255, 259 n.6 (1980). The California courts took judicial notice of City and County ordinances, plans, resolutions and other official acts of the City and the County. Petition, Appendix C, p. 3; and Appendix F, pp. 2–4 and 6.

[2] The demurrer was sustained without leave to amend for the third, fourth and fifth causes of action and overruled as to the first cause of action (inverse condemnation), second cause of action (denial of substantive and procedural due process), and sixth cause of action (declaratory and injunctive relief). *See* Petition, Appendix F, p. 6.

directed urban development into incorporated areas in order to conserve County resources, ensure the availability of municipal services and prevent urban sprawl. *See* California Government Code § 65859.

In 1984 Long Beach Equities ("LBE"), a holding company of a bank, allegedly purchased two hundred fifty (250) acres of the two thousand eight hundred (2,800) acre Marr Ranch which is one of many large ranches near the City of Simi Valley within the City's sphere or area of influence. The City's general plan covers these unincorporated areas. In 1984 the City's then existing general plan showed intense *future* development for the Marr Ranch area. (One thousand one hundred (1,100) residential units and a shopping center.) The City adopted hillside grading restrictions and a ten (10) year growth management program in 1986, and a revised general plan The density and intensity of development was reduced City-wide and in its sphere and area of influence, including the Marr Ranch, as a result of these actions. A brief development moratorium was in effect while the City studied planning alternatives. *See* California Government Code § 65858.

After purchasing the two hundred fifty (250) acres in 1984 LBE took a preliminary steps towards annexation by proposing a specific plan for the Marr Ranch.[3] Because there are multiple ownerships within the Marr Ranch the City became the applicant for the specific plan. The draft

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[3] A specific plan is a legislative act, *Yost v. Thomas*, 36 Cal.3d 561 (1984). It is a traditional planning tool authorized by the California Legislature over twenty-five (25) years ago for the "systematic implementation" of a general plan. California Government Code § 65451.

specific plan was revised after the hillside development restrictions went into effect. When the City began its general plan revision (and adopted a development moratorium), LBE ceased pursuing annexation to the City. The City's revised general plan adopted in 1988 permits three hundred twenty-five (325) residential units on LBE's two hundred fifty (250) acre parcel. In 1984, LBE attempted to file a subdivision map with the County for two hundred forty-nine (249) units. In accordance with its long existing annexation policies the County told LBE it must first annex to the City before subdividing the property for urban development.

LBE has never applied to annex to or develop in the City of Simi Valley.

C. Petitioner Misstates The Facts.

Even with the liberality afforded pleading cases by both California and federal courts, petitioner's statement of the case to this Court is out of bounds. The statement not only misrepresents the actual facts and opinion below and facts of which the California courts may and did take judicial notice, the statement also misrepresents the facts *as pleaded in petitioner's own complaint.* For example:

1. Petitioner now claims, but did not allege in its complaint, that it only purchased the property "after both the County and the City assured LBE that both entities believed that the property was uniquely suited for immediate development." Petition, p. 2.

Before the property can be developed, the area must be annexed to the City pursuant to California Government Code §§ 56000 et seq. The property may be "prezoned" as a first step. California Government Code § 65859. LBE

never applied to prezone the land or annex to the City. Before development can occur petitioner must also submit applications for approval of a development plan, a subdivision map and building permits.

2. Petitioner now claims but did not allege that "at the City's *request* LBE prepared a Specific Plan." Petition, p. 2, ¶ 2; emphasis added.

This is not alleged in the complaint. In 1984 LBE prepared a draft specific plan. LBE abandoned the specific plan and has never petitioned to annex to the City or made any development application to the City.

3. "[A]t the City's encouragement and *request* LBE paid to have infrastructure being installed in the neighboring development [oversized]." Petition, p. 3.

This is nowhere alleged and is completely false. Paragraph 25 of the first amended complaint alleges that "[E]ncouraged by the Defendants, Long Beach Equities cooperated in paying for the oversizing of the infrastructure installed through the residential development immediately adjacent and to the south of the 250 acre parcel. . . ." There is no infrastructure to service urban development *on* LBE's property.

4. "The City imposed a moratorium . . . and stopped processing the Specific Plan for this property." Petition, p. 3.

The long expired moratorium (in 1987) did not apply to LBE's specific plan. The moratorium only applied to development permits, not legislative acts such as specific plans and zoning. LBE simply abandoned the specific plan and never pursued annexation to the City.

5. "But the City won't process that application [for two hundred forty-nine (249) homes] until LBE prepares a new Specific Plan. . . ." Petition, p. 3.

This is a complete falsehood and not alleged in the complaint. LBE never submitted its subdivision proposal to the City and development permits. The City will accept applications for annexation, a specific plan if only LBE would submit one.

6. "City employees told the County Board of Supervisors that it would take 8 to 10 years for LBE to complete the Specific Plan/EIR process now demanded and then obtain project approval, and then seek some of the few building permit allocations now permitted under the City's slow 'growth ordinance.'" Petition, p. 3.

LBE misrepresents the comments of an assistant City planner at a County Board of Supervisors public hearing. The planner said the City's growth management program is a ten (10) year program, *not* that it would take LBE ten (10) years to develop in the City. *See* Appendix 2.

REASONS WHY THE WRIT SHOULD BE DENIED

INTRODUCTION

While many important questions may have been left unanswered by this Court's 1987 regulatory takings decisions,[4] this is not the case to answer them. Under even the most conservative interpretation of takings jurisprudence, a land use regulation that allows three hundred twenty-five (325) units on two hundred fifty (250)

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[4] *Keystone Bituminous Coal Assoc. v. DeBenedictus*, 480 U.S. 470 (1987); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *First English Evangelical Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

acres of ranch land does not on its face constitute a taking of private property without just compensation, and a developer must at least try to annex to and develop in the City before claiming it would be futile to do so. The City's growth management program (Appendix 3) which permits substantial development each year does not on its face prohibit LBE from developing; LBE cannot be put in a better position than other potential developers by refusing to even apply to annex *to* or for permission to develop *in* the City.

Even if petitioner's constitutional claims had some merit and even if the California court erred in its analysis, the outcome of this case would be the same because petitioner's facial challenges to the City's regulations are barred by statutes of limitation and the City has not applied it regulations to petitioner's property.

I.

THE STATE COURT'S DECISION DOES NOT CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT

A. The Alleged Facts In This Case Do Not Come Close To The Limits Of Police Power.

Even if there is confusion in the lower courts about the meaning of "economically viable use of property" this is not the case to dispel it. The state appellate court correctly stated this Court's standard for takings analysis:

> "To state a cause of action for inverse condemnation LBE must plead facts which show *either* that: (1) the application of the general zoning laws to its property does not

> substantially advance a legitimate state interest; *or* (2) such laws deprive it of substantially all economically viable use of its land."[5] Petition, Appendix C, p. 10; emphasis added.

California courts have not hesitated to tell state and local governments when they exceed their police powers.[6] On its facts, this case does not present any important question for this Court's review.

1. The State Court Followed This Court's Guidance When It Found that the Local Land Use Regulations Do Not Constitute a Facial Taking.

a. The state courts examined the City and County regulations and found that they substantially advance legitimate state interests.

The state court took judicial notice of and examined the City and County regulations and found that both the County's Guidelines for Orderly Development and the

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[5] *E.g.*, *Agins*, 447 U.S. 255, 261; *Nollan*, 483 U.S. 825; *Keystone*, 480 U.S. 470; and *First English*, 482 U.S. 304.

[6] *E.g.*, *Surfside Colony, Ltd. v. California Coastal Commission*, 226 Cal.App.3d 1260, 1267-1269 (1991) [applying *Nollan*]; *Twaine Harte Associates, Ltd. v. County of Tuolumne*, 217 Cal.App.3d 71, 80–92 (1990) [denial of use of parcel]; *Rohn v. City of Visalia*, 214 Cal.App.3d 1463, 1472-1477 (1989) [illegal exaction]; *Elysium Institute, Inc. v. County of Los Angeles*, 232 Cal.App.3d 408 (1991) [equal protection].

City's growth management program substantially advance legitimate state interests. The Court of Appeal observed:

> "The County enacted the Guidelines to promote *efficient and effective delivery of community services and to conserve the resources of County by encouraging urban development to occur within cities.* The Guidelines emphasize annexation as a means to accomplish these purposes.
>
> "City enacted its ordinance 'to protect the unique, hill-surrounded environment; enhance the quality of life; promote public health, safety or welfare and the general well-being of the community. . . .' By limiting the rate, distribution, quality and type of residential development on an annual basis, with periodic reviews of the ongoing situation, City seeks 'to improve local air quality, reduce traffic demands . . . and ensure that future demands for such essential services as water, sewers and the like are met. . . .'" Petition, Appendix C, p. 11; emphasis added.

The state court's recognition that "such legislative action is well designed to prevent the ill effects of poorly planned urbanization" (Petition, Appendix C, p. 13) is one that this Court has repeatedly acknowledged. *E.g.*, *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 392-395 (1926); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974); *Agins*, 447 U.S. 255, 261. As often noted by this Court, such legislative determinations are the province of the legislative bodies, not the courts. *City of New Orleans*

v. Dukes, 427 U.S. 297, 304 (1976); *Berman v. Parker*, 348 U.S. 26, 32-33 (1954).

b. The state court examined the City and County regulations and found that they do not foreclose all development.

The City's regulations which permit LBE three hundred twenty-five (325) units on two hundred fifty (250) acres do not on their face deny "economically viable use" of LBE's property. *Agins*, 447 U.S. 255, 262 [maximum of one (1) unit per acre]. This general plan designation allows more density than the two hundred forty-nine (249) units LBE allegedly desires. *Cf.*, Petition, p. 3.

The state court correctly observed that the City and County regulations "do not rule out development upon annexation." Petition, Appendix C, p. 22. The City growth management ordinance, of which the state courts took judicial notice, does not on its face require that development be delayed. In fact certain types of housing (*e.g.*, affordable) are given priority. Appendix 3, p. 4, § 7. "If LBE successfully applied for annexation it could explore other possibilities for development under the growth management ordinance." Petition, Appendix C, p. 18.

Interesting questions as to the precise meaning of "reasonable investment back expectations," "economically viable use" or "ripeness" are not justiciable in this case.

2. The State Courts Followed This Court's Guidance in Holding LBE's "As Applied" Claims Not Ripe for Judicial Review.

LBE has never presented any development plans upon which the City might act. It would be a novel idea indeed to hold that the City may be held accountable for a regulatory "taking" of property over which it has absolutely no legal jurisdiction or regulatory control. The City has no such power until the property is annexed to the City.

LBE did take a very preliminary step toward annexation by proposing a specific plan in 1984. LBE *does not allege* that this specific plan was ever formally rejected by the City. LBE has never actually applied to annex to the City. Having failed to pursue annexation or submit and pursue to conclusion any application to develop in the City, LBE lacks the essential element of an "as applied" claim — a *final decision* reflecting the City's *actual application* of its regulations to the property.

Since *Williamson County Regional Planning Comm. v. Hamilton Bank*, 473 U.S. 172, 189–191 (1985), it has been recognized by this Court and all the circuit courts that failure to seriously pursue development approvals through available legal channels is a jurisdictional bar to an "as applied" taking claim.[7] These cases rest upon

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[7] *See e.g., MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351-352 (1986); *Gilbert v. City of Cambridge*, 932 F.2d 51, 61 (1st Cir. 1991); *Eide v. Sarasota County*, 908 F.2d 716, 723-727 (11th Cir. 1990), *cert. denied* 111 S.Ct. 1073 (1991); *Landmark Land Company v. Buchanan*, 874 F.2d 717, 721–722 (10th Cir. 1989); *Unity Ventures v. County of Lake*, 841 F.2d 770, 774-776

(continued...)

important practical as well as jurisdictional restrictions. "A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *MacDonald*, 477 U.S. 340, 348. They also rest on a fundamental substantive restriction. Until a landowner's good faith efforts to actually develop (or otherwise utilize) the property have been *denied* by the government, the government has not taken the property. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126-127 (1985) [mere imposition of permit requirements not a taking]; *Gilbert*, 932 F.2d 51, 61.

Ripeness is not a game invented to test a landowner's pleading ingenuity or adeptness at filing pretextual development "applications." Ripeness mandates genuine efforts to comply with existing police power regulations before the jurisdiction of the courts may be invoked. LBE has made no such effort, and therefore has no basis for claiming that its constitutional rights have been denied. This case, contrary to LBE's suggestion, does not involve any fine points of the "ripeness" doctrine. LBE's claims are mainstream and dead center, precisely the type of speculative, premature claims barred by the ripeness doctrine.

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[7](...continued)
(7th Cir. 1988), *cert. denied* 488 U.S. 891; *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1453–1455 (9th Cir. 1987), *cert. denied* 484 U.S. 1043 (1988); *Kaiser Development Co. v. City and County of Honolulu*, 649 F.Supp. 926, 940–942 (D. Haw. 1986), *affirmed* 898 F.2d 112.

II.

LBE'S CONSTITUTIONAL CLAIMS ARE ALSO TIME BARRED

LBE's challenges to the City's land use regulations are also inappropriate for this Court's review because all of LBE's facial claims are barred by applicable statutes of limitation. Though not addressed in the state court's opinion, the issue was raised and briefed in the City's petition for extraordinary relief.

The time limits for any facial taking claim run from the time the challenged regulations are enacted. *Zinermon v. Burch*, 494 U.S. 113 (1990) [substantive due process violation is "complete when the wrongful action is taken"]; *De Anza Properties X, Ltd. v. County of Santa Cruz*, 936 F.2d 1084, 1085-1086 (9th Cir. 1991); *Barancik v. County of Marin*, 872 F.2d 834, 836 (9th Cir. 1988), *cert. denied* 110 S.Ct. 242 (1989). The statute of limitations for any challenge to the City's zoning or general plan enactments is one hundred twenty (120) days. California Government Code § 65009; *see Rossco Holdings, Inc. v. State of California*, 212 Cal.App.3d 642, 565–661 (1989), *cert. denied* 110 S.Ct. 1809 (1990);[8] *California Coastal Commission v. Superior Court (Ham)*, 210 Cal.App.3d 1488, 1495–1496 (1989) [holding statutory time limits for mandamus challenge also control inverse

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[8]. Petitioner blatantly misrepresents the holding of *Rossco Holdings*, 212 Cal.App.3d 642 by stating that this decision requires a landowner to challenge the constitutionality of underlying statutes as a prerequisite to challenging any zoning action. This is false. The case merely states that any damages claim for a taking must be brought within the same time period as a petition for writ of mandate, *i.e.*, the time for legal challenge on any other grounds.

condemnation challenges to land use regulatory actions]. The time limit for any facial challenge under 42 U.S.C. § 1983 in California is one year from the date of enactment. *De Anza Properties*, 936 F.2d 1084, 1085; *Barancik*, 872 F.2d 834, 836.

The County Guidelines were adopted in 1969; the City's growth management ordinance in 1986, both more than one (1) year before this action was filed. The general plan amendment permitting three hundred (325) units on LBE's two hundred fifty (250) acres occurred in October 1988, more than one hundred twenty (120) days before the City was named a defendant in this action.

III.

THE STATE COURT FOLLOWED THIS COURT'S GUIDANCE IN DETERMINING THAT THE CITY'S REGULATIONS DO NOT VIOLATE LBE'S SUBSTANTIVE DUE PROCESS RIGHTS

This case presents no colorable issue of "arbitrary or capricious" regulation implicating substantive due process concerns. This is not the case of an individual property or property owner singled out for vindictive or irrational treatment, a fact which serves to distinguish it from virtually every case in which a violation of substantive due process has been found. *See, e.g., Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988). Rather, LBE simply speculates as to the *effects* of a number of city-wide and county-wide planning policies (*i.e.*, the City's growth management program, the City's hillside zoning ordinance, the City's comprehensive general plan revision, and the County's annexation policy.) The County's annexation policy had been in effect for fifteen (15) years before LBE

bought the property. While the density of development for LBE's property was reduced by the hillside zoning and general plan revision, LBE fared no differently than many other owners of undeveloped land, and retains the ability to develop three hundred twenty-five (325) residences on its property. To suggest that "malice" or some concealed motive of "preventing development of LBE's property" (petition, p. 23) can be implied from these city-wide general planning actions is simply ridiculous.

LBE apparently also suggests that *any* attempt to downzone property is inherently "arbitrary and capricious" — at least where adequate infrastructure and services are allegedly available — and should be subjected to court scrutiny under a "balancing" test. This Court has never suggested, however, that the legitimate function of planning and zoning regulations is limited to determining whether "adequate" sewer, water and other services are available for a particular property. Government planners must also obviously take into account the ability of regional facilities and resources to serve *all* development in the area, not merely development on the plaintiff's land. Here the City's regulations were adopted, among other things, "to improve local air quality, reduce traffic demands. . . and ensure that future demands for such essential services as water, sewers and the like are met. . . ." Petition, Appendix C, p. 11. Limitations on development may also be imposed for a variety of other reasons recognized as legitimate by this Court. *See, e.g., Village of Belle Terre*, 416 U.S. 1, 9 [preserving quiet residential character]; *Agins*, 447 U.S. 255, 261 [discouraging "premature and unnecessary conversion of open-space land" and protecting residents from "ill-effects of urbanization"]; *Dukes*, 427 U.S. 297, 304 [preserving community character]; *see also*

Penn Central Trans. Co. v. City of New York, 438 U.S. 104, 129 (1978); *Berman*, 348 U.S. 26, 33 [community may be "beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled"].

This is also not, as LBE attempts to characterize it, a case of "refusal to permit development." Petition, p. 23. This is the case of a developer who has never seriously applied for permission to develop under the locally mandated procedures, *i.e.*, annexation to the City and application for development approvals through the same channels as every other property owner in the City. The City's regulations on their face permit substantial development once the property is annexed to the City.

IV.

THE PETITION DISCLOSES NO SPECIAL AND IMPORTANT REASONS FOR GRANTING REVIEW IN THIS CASE

The leitmotif of LBE's petition is that the standards for "taking" and other constitutional challenges to land use regulations are unsettled. LBE does little, however, to explain how the facts alleged in this particular case will assist the Court to resolve these thorny issues.

A. There Is No Developed Factual Record.

Because this case comes to this Court from a dismissal at the pleading stage, there is no developed factual record which would assist the court in realistically addressing concrete land use issues of general concern. The "record" consists of scattered factual allegations in LBE's complaint, embedded in literally scores of pages of rhetorical vilification and *characterization* of the

respondents' actions and a voluminous amount of city/county documents of which the California courts took judicial notice. At most this case presents pleading issues under California law. Perhaps even this would be of some interest to California land use lawyers, but it is unlikely to provide any useful guidance or clarification of substantive issues to government planners and officials, landowners, the general public, or trial courts presented with genuine constitutional issues. Consideration of this case would not represent the best use of this Court's time, even were the purported constitutional issues raised by LBE fairly presented.

B. This Case Implicates No Important Unsettled Issue of Takings Law.

On it face, this case is nothing more than a garden variety zoning case. Even assuming that issues remain to be resolved in the area of takings clause jurisprudence, this case offers scant opportunity to expand on existing case law.

1. The Case Provides No Genuine Opportunity to Define "Economically Viable Use".

The challenged land use regulations in this case provide for development of three hundred (325) units on two hundred fifty (250) acres. Whatever, the outer boundaries of "economically viable use," they are plainly not implicated by residential zoning in excess of one (1) unit per acre. *Cf.*, *Agins*, 447 U.S. 255, 262.

2. The Case Involves No Important Issue as to the Legitimacy of Governmental Regulations.

This case involves no novel issue regarding the legitimacy of land use regulations. It merely involves the time-worn claim that changes in local land use policies might render the developer's plans impractical. LBE does not seriously contend that any of the stated purposes of City's and County's regulations are illegitimate, nor could it given well settled authority. *See,Village of Euclid*, 272 U.S. 365; *Village of Belle Terre*, 416 U.S. 1, 9; *Agins*, 447 U.S. 255, 261; *Dukes*, 427 U.S. 297, 304; *Penn Central*, 438 U.S. 104, 129; *Berman*, 348 U.S. 26, 33. Neither is this a case in which the regulations fail to "substantially advance" their apparent goals. Rather the purpose and effect — that of abating the consequences of runaway development — are direct and to the point.

LBE also suggests that assessment of the legitimacy and reasonableness of the respondent's actions necessarily requires a factual trial and a fine balancing of interests. Petition, p. 12-13, citing *McDougal v. County of Imperial*, 942 F.2d 668, 679–680 (9th Cir. 1991). This argument simply ignores the posture of the case. The only challenge currently justiciable is a facial challenge to the City's and County's general policies.[9] In the context of facial challenges, this Court has had little trouble resolving the legitimacy of such challenged regulations. *See, e.g., Agins*, 447 U.S. 255; *Keystone*, 480 U.S. 470, 485-492; *Hodel v. State of Indiana*, 452 U.S. 314, 327-329 (1981). In an individual permit case, such as *McDougal*, 942 F.2d 668,

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[9] Assuming the applicable statues of limitation are ignored.

the court may indeed have occasion to more closely examine the relationship between purported government objectives and the actual impacts of the regulation. *McDougal* involved the imposition of particular development restrictions and conditions, not promulgation of general policies.

The challenged regulations in this case are neither unduly harsh or unusual on their face—they permit development of three hundred twenty-five (325) units on LBE's land—nor is there any apparent mismatching of ends and means. *Cf.*, *Nollan*, 483 U.S. 825. The regulations limit the overall intensity of development on LBE's land, and elsewhere in the City and its sphere and area of influence. This is precisely what they must do to serve the obvious, permissible goals relating to air quality, water supply, solid waste disposal and traffic congestion. This Court cannot endorse plaintiff's view that the legitimacy of every planning action must be tested by a judicial trial. Contrary to LBE's view, the state court of appeal acted correctly in this case in resolving the legitimacy issue as a matter of law.

3. This Case Presents No Bona Fide Issue of Frustrated "Reasonable Investment-Backed Expectations."

LBE contends that this Court has not exhaustively examined or explained the significance of "reasonable investment-backed expectations" in takings analysis. LBE, however, remains free to develop its property for residential development. *Cf.*, *Agins*, 447 U.S. 255, 262 [owner remains free to pursue "expectations" through permit process]. The City and County policies requiring annexation and preparation of a specific plan were in effect

long before LBE bought its property. LBE's only possible complaint is its speculation that it may not be able to build as fast as it would like under the City's growth management program.

This Court has made it abundantly clear that asonable investment-backed expectations" are significant only when they are *reasonable*. *Philips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988) ["We have recognized the importance of honoring reasonable expectations in property interests. [Citation.] But such expectations can only be of consequence where they are 'reasonable' ones."]; *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1006-1008 (1984).

Like the Fifth Amendment notion of "property" itself, the "reasonableness of a landowners expectation" can only be understood in the context of applicable state laws. *Cf.*, *Ruckelshaus*, 467 U.S. 986, 1001; *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980). In an area subject to heavy ongoing governmental regulation there can be no reasonable expectation that regulations will remain frozen for a particular property owner's benefit. *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 226-227 (1986); *Ruckelshaus*, 467 U.S. 986, 1008-1010. As this Court has indicated many times, exposure to changing regulations is merely one of the inherent "incidents" to property ownership; only where regulatory changes are "substantial and *unforeseeable*, and can easily be identified and redistributed" do they become significant for takings purposes. *Kirby Forest Products, Inc. v. United States*, 467 U.S. 1, 14 (1984); emphasis added. The County's annexation policies were in effect for over fifteen (15) years before LBE purchased the property and most

cities in the County had already adopted some sort of growth management program to address traffic and air quality concerns. *See Pardee Construction Co. v. City of Camarillo*, 37 Cal.3d 465 (1984).

Land use regulation is classically a field in which current policies are subject to change. Under California law, a general plan is by nature tentative and "subject to alteration." *Selby Realty Co. v. City of San Buenaventura*, 10 Cal.3d 110, 119-120 (1973). Also under California law, a landowner generally accrues no right to rely on existing zoning until all development permits have been granted. *Avco Community Developers, Inc. v. South Coast Regional Comm.*, 17 Cal.3d 785, 791-797 (1976), *cert. denied* 429 U.S. 1083. The court below relied on this principle in finding that no "reasonable investment-backed expectations" of LBE's were implicated by the city and county regulations.

LBE is a sophisticated investment firm, well schooled in the uncertainties of land use development. LBE could have no "reasonable expectation" that it would be exempted from the city-wide changes in zoning and reevaluation of the general plan which occurred in 1984-1988. Indeed, some of the policies LBE complains of (*i.e.*, the County's annexation policy and the City's requirement for a specific plan) were in place when LBE purchased its property in 1984.

C. This Case Presents No Close Issue of Ripeness.

LBE contends in its headline argument that "there is hopeless confusion throughout the country on what it takes to 'ripen' a regulatory taking case . . ." Petition, p. 23. Somewhat paradoxically, LBE argues in the text that

determination of ripeness is inherently an *ad hoc* exercise (*ibid.*), and hence one which defies the promulgation of fixed judicial rules. If ripeness indeed requires an inherently *ad hoc* determination, it can hardly be said that reviewing the *ad hoc* analysis of the state court of appeal in this case will lead to a major settling of the law in this area.

"Ripeness" considerations do not, of course, bar facial challenges to governmental regulations. *Keystone*, 480 U.S. 470, 485–494; *Agins*, 447 U.S. 255, 260 [taking claim]; *Village of Euclid*, 272 U.S. 365, 386. This was recognized by the court of appeal in this case. Petition, Appendix C, pp. 11 and 19.

"Ripeness" is a concern where the property owner alleges that the actual *application* of otherwise valid regulations will produce an unconstitutional *result*. LBE has alleged no facts supporting such a claim. As this Court has long recognized, such a case cannot be litigated until the court has some idea of what the *result* of application of the regulations will actually be. *MacDonald*, 477 U.S. 340, 349-351; *Williamson County*, 473 U.S. 172, 191. The courts below have universally declined to accept a plaintiff's mere speculations as to the future result, for obvious reasons. Litigation of such a case can only result in a trial of what *might* occur in the future, not what actually has or will occur.

Instead of opening the courts to judicially sponsored guessing games, the lower courts following *MacDonald* and *Williamson County* have universally held that no concrete controversy arises until there has been at least an actual attempt to develop under the laws (generally manifested by an actual application), and at least some affirmative government action to deny development. *See, e.g.*, cases

cited at note 7. Some decisions suggest that a concrete controversy may be precipitated by affirmative governmental acts other than formal denial of an application, such as a preemptive rezoning or other action specially calculated to defeat the application. *Landmark Land*, 874 F.2d 717, 721-722; *Gilbert*, 932 F.2d 51, 61; *cf.*, *Hoehne v. County of San Benito*, 870 F.2d 529 (9th Cir. 1989) [rejected application *followed by* rezoning excused further applications]. LBE, however, does not allege any facts which even approach the threshold of ripeness. There is no dispute that the mandated path to development in this case was annexation to the City, and that LBE never petitioned to annex.

LBE also contends that the development process under the City's jurisdiction might take too long. No facts, however, support this allegation. The state court of appeal examined the City's *actual regulations* and found:

> "Neither is it "'clear beyond peradventure . . .'" that the Growth Management Ordinance would result in such excessive delay that it can be assumed that all of the property's beneficial uses have presently been destroyed. (*See Kinzli v. City of Santa Cruz*, *supra*, 818 F.2d at p. 1454, fn.5, citing *Norco Construction, Inc. v. King County*, 810 F.2d 1143, 1145 (9th Cir. 1986).) The instant temporary ordinance calls for a reevaluation in 1991 of its restrictions, pursuant to the 1990 census and it automatically expires in 1996." *See* Appendix C, p. 6, § 11.

The state court also found after reviewing the City's growth management program that "The restrictions in the Growth Management Ordinance and the open-space zoning designations do not rule out development upon annexation." Petition, Appendix C, p. 22. This Court has never suggested that speculative "delays" amount to a "taking" of property. *See Agins*, 447 U.S. 255, 263 n.9; *cf.*, *First English*, 482 U.S. 304, 321 [distinguishing "normal delays in obtaining building permits, changes in zoning ordinances, variances and the like"]. The state court of appeal's interpretation of the City's ordinances themselves — as opposed to LBE's self-serving and wholly inaccurate *characterizations* of the regulations — does not offend constitutional sensibilities. Courts of law are competent to interpret ordinances and regulations; they are not bound by a plaintiff's pleaded interpretation or speculation regarding their meaning.

LBE takes refuge in a line of cases which hold that the ripeness requirement is satisfied where the result of the regulations is certain, *i.e.*, pre-ordained by the regulations themselves. Petition, pp. 28-29. The example given is *First English*, 482 U.S. 304, where the challenged regulations *on their face* (purportedly) banned *all* development.[10] This argument merely reiterates the obvious — *facial* challenges are not barred by ripeness considerations. A regulation which on its face forbids development is thus subject to immediate attack. This is not such a case.

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[10] *Cf.*, *First English Evangelical Church of Glendale v. County of Los Angeles*, 210 Cal.App.3d 1353, *cert. denied* 110 S.Ct. 866 (1989) [when the California court examined the actual ordinance it found the ordinance did not, in fact, ban all development].

CONCLUSION

For all the foregoing reasons respondent City of Simi Valley respectfully submits that this case presents no special and important reasons for review by writ of certiorari.

Respectfully submitted,
Freilich, Stone, Leitner & Carlisle
By KATHERINE E. STONE
Counsel of Record for Respondent
CITY OF SIMI VALLEY

APPENDICES

JOHN TORRANCE, CITY ATTORNEY
MARJORIE A. BAXTER, ASSISTANT CITY ATTORNEY
CITY OF SIMI VALLEY
2929 Tapo Canyon Road
Simi Valley, California 93063;
and
FREILICH, STONE, LEITNER & CARLISLE
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Attorneys for Respondents/Defendants
CITY OF SIMI VALLEY and
THE RANCHO SIMI OPEN SPACE
CONSERVANCY AGENCY

FILED
JAN 03 1992
SHEILA GONZALEZ, Superior Court
Executive Officer and Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF VENTURA

LONG BEACH EQUITIES, INC., a California corporation; MARR RANCH ASSOCIATES, INC., a California corporation, *Petitioners/Plaintiffs,* *vs.* COUNTY OF VENTURA; BOARD OF SUPERVISORS OF THE COUNTY OF VENTURA; PLANNING COMMISSION FOR THE COUNTY OF VENTURA; THE CITY OF SIMI VALLEY; THE CITY COUNSIL OF SIMI VALLEY; DOES 3 THROUGH 50, *Respondents and Defendant*	CASE NO. 103364 NOTICE OF ENTRY OF JUDGMENT

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on December 3, 1991 a judgment of dismissal was filed and entered in this action. Defendants City of Simi Valley and The City Council of Simi Valley were awarded costs in the amount of $6,189.75. Attached as Exhibit "A" is a true and correct copy of the judgment.

Dated: December 31, 1991

Respectfully submitted,

FREILICH, STONE, LEITNER & CARLISLE

By: Katherine E. Stone

KATHERINE E. STONE

Attorneys for Respondents/Defendants

CITY OF SIMI VALLEY, et al.

RECEIVED
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SUPERIOR COURT CLERK
VENTURA COUNTY

A-3

FILED
DEC - 5 1991
ADELA GONZALEZ, Superior Court
Executive Officer and Clerk
By M. Chavez

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF VENTURA

LONG BEACH EQUITIES, INC., a California corporation; MARR RANCH ASSOCIATES, INC., a California corporation, *Petitioners/Plaintiffs,* *vs.* COUNTY OF VENTURA; BOARD OF SUPERVISORS OF THE COUNTY OF VENTURA; PLANNING COMMISSION FOR THE COUNTY OF VENTURA; THE CITY OF SIMI VALLEY; THE CITY COUNCIL OF SIMI VALLEY; DOES 3 THROUGH 50, *Respondents and Defendants.*	CASE NO. 103364 JUDGMENT AND ORDER

The demurrer of defendants City of Simi Valley and City Council of Simi Valley ("City") to the first amended complaint was heard on October 26, 1989, before the Honorable Bruce Thompson, Judge of the Superior Court. Karen J. Lee of *HAMILTON & SAMUELS* appeared for plaintiff Long Beach Equities. Robert Philibosian of Baker & McKenzie appeared for plaintiff Marr Ranch. Katherine E. Stone of *FREILICH, STONE, LEITNER & CARLISLE* appeared for the City. The Court granted the demurrer without leave to amend as to the Third Cause of Action (discrimination in application of zoning and land regulation laws), Fourth Cause of Action (deprivation of civil rights), Fifth Cause of Action (conspiracy to deprive plaintiffs of civil rights), and overruled the demurrer as to

the First Cause of Action (inverse condemnation), Second Cause of Action (denial of substantive and procedural due process of law), and Sixth Cause of Action (declaratory and injunctive relief).

The City filed a petition for mandate to compel the trial court to sustain the City's demurrer in its entirety without leave to amend. In *Long Beach Equities, Inc. v. County of Ventura* (1991) 231 Cal.App.3d 1016, the Court of Appeal granted the City's petition for a writ of mandate and held "let a writ of mandate issue to compel the trial court to enter a new and different order sustaining City's demurrer in its entirety without leave to amend. Costs to the City and County." (*Id.* at 1042.) The remitter was issued on October 1, 1991.

NOW THEREFORE IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. The demurrer of defendants CITY OF SIMI VALLEY AND CITY COUNCIL OF SIMI VALLEY is sustained as to each and every cause of action without leave to amend.

2. The first amended complaint is dismissed with prejudice.

3. Plaintiffs shall take nothing by this suit.

4. Defendants CITY OF SIMI VALLEY AND CITY COUNCIL OF SIMI VALLEY are awarded costs to the City in the amount of $ 6189.75 .

Dated: DEC 2 1991

Bruce A Thompson

JUDGE OF THE SUPERIOR COURT

JANUARY 17,1989 TRANSCRIPT OF THE PUBLIC HEARING REGARDING GENERAL PLAN AMENDMENT SCREENING BY THE BOARD OF SUPERVISORS

SUPERVISOR LACEY: Any questions? Thank you very much. Did.. Mr. Lightfoot, you look like you now want to testify. O.K.

MR. JAMES LIGHTFOOT: Madam Chairman and members of the Board, I apologize for the statement I made earlier. It was not my intent to speak, but inasmuch as representatives of Long Beach Equities have raised the issue of the growth control ordinance, I felt that it was worthwhile to remind you of where the numbers came from initially. In 1985, in conjunction with development of the 208 Water Quality Plan, the Air Quality Management Plan, the Spheres of Influence Study, and the Sub-regional Transportation Plan, the County prepared the Countywide Planning Program (CPP) Population Forecast which allocated population growth to various jurisdictions within the County. These populations forecasts were adopted by this Board of Supervisors, and subsequently were adopted by the various cities including the City of Simi Valley. In July of 1986, the City adopted its Control Growth Management Plan which was designed to bring the City's growth into conformance with the CPP projections. Uh, what we now see is an application to the County by Long Beach Equities for a General Plan Amendment, and Tentative Tract approvals, that appear to be an attempt to avoid adherence to the City's general plans, City's codes and ordinances, as well as the CPP projections adopted by the County. Consequently, the City must object in the

strongest possible terms to these actions being processed by the County. The comments that both Mr. Freidman and Mr. Hamilton made about the timing are fairly close to correct. We have a program that was adopted, it's a ten-year program as mentioned, in 1986, in July, that has specific rules applied to the first five years only. The City is now approaching the fourth and fifth year, and the numbers of permits that will be available in this fourth and fifth year are very limited because of the numbers that were issued in the first three years. At the point of reevaluation, at the five-year mark, we will have, we believe, the information from the 1990 federal census. If we have managed to adhere to the CPP projections in a workmanlike and satisfactory manner, the rules that were adopted for the first five years, in all probability, will be relaxed. However, if we find that the population has grown beyond our projections, then the next five years are going to be as tight as the first five. The other statements as have been made by your staff, referring to the policies, the policies adopted by LAFCO, these we certainly concur with, but we believe that to avoid the actions that the City has laid out in their codes and ordinances at this time is certainly not an action that we would feel should occur. The question was raised by Mr. Hamilton, where is the injury, where is the reason for adhering to the City's code and ordinances? We believe that the reason and the injury has to do with the numbers that were developed under the 208 Water Quality Management Plan, the Air Quality Plan, and the other plans dealing with the transportation and infrastructure. I'd be happy to answer any other further questions. Thank You.

SUPERVISOR LACEY: Any questions? Thank you, very much. That's all the cards I have on this one.

SUPERVISOR JAMES DOUGHERTY: Madam Chair, the testimony and the aerial photo that we've been given clearly indicate that this is entirely a City problem. If in fact, the Board is going to be called upon to address what some persons may see as inequities occurring in the cities another forum is going to have to tell us to do that. So, with those words, Madam Chairman, I would move to follow the staff recommendations and deny this project.

SUPERVISOR LACEY: O.K., any objections? All right, that will be the straw motion. O.K., item 5. I don't have any cards on this, I'm just telling you that.

(Mr. Eisenhut proceeds with the next request)

CERTIFICATE OF THE CLERK OF THE BOARD OF SUPERVISORS COUNTY OF VENTURE

I RICHARD D. DEAN, County Clerk and Ex-officio Clerk of the Board of Supervisors of the County of Venture, State of California, do hereby certify that the attached transcript of the Venture County Board of Supervisors hearing of January 17, 1989, Item No. 6, Applicant No. 4, is true and correct, as per the recording of said meeting, on file in the Clerk of the Board Office, Administration Building of the County Government Center, 800 South Victoria Avenue, in the City of San Buenaventura, County of Venture, State of California.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of said Board of Supervisors to be affixed hereto this 16th day of February, 1990.

RICHARD D. DEAN, County Clerk
and Ex-officio Clerk of the
Board of Supervisors

By _____
Deputy

ORDINANCE NO. 638

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SIMI VALLEY ADOPTING A CONTROLLED-GROWTH LIMITATION PLAN AND MAKING FINDINGS OF FACT IN SUPPORT THEREOF

WHEREAS, The City Council of Simi Valley is concerned about the rate of growth and quality of development in the City. While the City Council recognizes the need for new jobs, improved shopping facilities and housing opportunities for all the residents of the community, including young adults, families and senior citizens, they also recognize the need to augment the existing General Plan policies and City ordinances which regulate residential development. Therefore, in order to protect the unique, hill-surrounded environment; enhance the quality of life; promote public health, safety of welfare and the general well-being of the community, the City Council deems it necessary to adopt a strong CONTROLLED-GROWTH LIMITATION PLAN. This Plan will limit the rate, distribution, quality and type of residential development on a year-to-year basis to improve local air quality, reduce traffic demands on local streets and the 118 Freeway and ensure that future demands for such essential services as water, sewers and the like are met; and

WHEREAS, the City Council has monitored development and land uses, and related trends in the Community in accordance with the General Plan; and

WHEREAS, the City Council held public meetings on May 5, 12 and 19, 1986 and duly noticed public hearings on June 9, 16, 23, 26 and 30, 1986 to consider issues

associated with the City's future population and growth and the consideration of growth management alternatives.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF SIMI VALLEY DOES ORDAIN AS FOLLOWS:

SECTION 1. The City Council finds and declares that:

A. The above recitals are true and correct.

B. The adoption of this CONTROLLED-GROWTH LIMITATION PLAN will not have a significant effect on the environment and that a Negative Declaration has been completed in compliance with C.E.Q.A. and the State C.E.Q.A. Guidelines and said Negative Declaration is hereby approved.

C. The adoption of a CONTROLLED-GROWTH LIMITATION PLAN is necessary to carry out the City's General Plan Goals and Policies, incorporated herein by reference and for the protection of the public health, safety, or welfare based upon the findings contained in Section 2 herein.

SECTION 2. The City Council further finds and declares:

A. That the Countywide Planning Program's base population projections for the Simi Valley Growth Area from 1980 to 2010 (1980, 80,294; 1985, 90,640; 1990, 103,220; 1995, 112,650; 2000,121,170; 2005, 129,220; 2010, 136,930) will permit orderly improvement of water supply, wastewater treatment, flood control and regional transportation facilities and are used as a major component in the creation of the Air Quality Management Plan (AQMP).

B. That maintenance of clean and healthful air is essential to the community, and failure to adopt a CONTROLLED-GROWTH LIMITATION PLAN will pose a threat to the public health, safety, or welfare by impeding the AQMP's Reasonable Extra Efforts Program.

C. That future residential development which is not in compliance with the Countrywide Planning Program may force some local streets to service Level F at peak hours, and that the 118 Freeway, during morning and evening peak hours, is already operating in excess of capacity. The inability of the 118 Freeway to handle projected traffic for Simi Valley, Moorpark and Thousand Oaks is a region-wide problem.

D. That the traffic operating at Level F during peak hours will cause a decline in local air quality and create the potential for decline in the health of residents of the community.

E. That it is important to the health, safety or welfare of the residents of Simi Valley that local roadways and the 118 Freeway operate at the best available functional level.

F. That the Cities of Simi Valley, Thousand Oaks, and Moorpark and the County unincorporated area, by virtue of a substantial number of approved units, have provided ample opportunity for additional dwelling units in eastern Ventura County. Therefore, the City Council has balanced the effect of this CONTROLLED-GROWTH LIMITATION PLAN against the region's housing needs and have determined that the facts supporting the need for the CONTROLLED-GROWTH LIMITATION PLAN outweigh the effects which the PLAN might have on the region's housing needs.

G. That numerous vacant industrial buildings in the City demonstrate that local employment is not keeping pace with dwelling unit construction and new residents are forced to commute to jobs outside Simi Valley, further aggravating 118 Freeway peak hour congestion.

H. That the adoption of a CONTROLLED-GROWTH LIMITATION PLAN to limit growth will allow the Ventura County Flood Control District to provide necessary channel improvements to Calleguas Creek, Arroyo Simi, Sycamore Canyon, and Tapo Canyon at a rate that will help keep pace with future development. Floods have occurred in the Oxnard Plain over the past eight years, resulting in millions of dollars in property damage. Several of these floods have led to the filing of lawsuits against the City, alleging that the development has increased stormwater runoff into the Arroyo Simi, thus contributing to downstream flooding. The fiscal threat to the City of these types of cases poses a threat to public health, safety, or welfare. The CONTROLLED-GROWTH LIMITATION PLAN will reduce future development-related stormwater runoff into Calleguas Creek, thus minimizing the potential for lawsuits against the City.

I. That this CONTROLLED-GROWTH LIMITATION PLAN is needed because the supply of water from the Calleguas Municipal Water District may be restricted by the Metropolitan Water District during peak demand hours in the future.

J. That due to the historical decline in school enrollment and the holding in reserve of closed schools, the CONTROLLED-GROWTH LIMITATION PLAN will not adversely affect the Simi Valley Unified School District.

K. That the County of Ventura has adopted the Countywide Planning Program for the protection of the public health, safety, or welfare based upon findings of fact relating to the impacts of air quality, water quality, traffic and balancing the region's housing needs.

L. That in reliance on the Countywide Planning Program findings of fact, which are incorporated by reference herein, the City has adopted the population projections of said Program.

SECTION 3. The City's actual population is the determining factor in this CONTROLLED-GROWTH LIMITATION PLAN.

SECTION 4. The adopted Growth Area Population Guidelines which are used in the Countywide Planning Program, AQMP, 208 Water Quality Management Plan and Regional Transportation Plan for the Growth Area are established as the population forecast used in this CONTROLLED-GROWTH LIMITATION PLAN. The target population for 1991 shall be 105,106, and the maximum permissible population for 1996 shall be 114,354. The City Council shall reserve the right to further limit population growth for the purpose of promoting public health, safety, or welfare; traffic control; compliance with County, State, or Federal regulations; or other compelling reasons.

SECTION 5. To reasonably implement a CONTROLLED-GROWTH LIMITATION PLAN, a population limitations may be achieved only through restrictions on issuance of building permits for new dwelling units. For this purpose, the term "equivalent dwelling unit" shall be utilized, which, at the adoption hereof, shall be defined as:

a) an apartment unit is equivalent to 2.3 residents, and

b) any other single family dwelling unit is equivalent to 3.358 residents.

These ratios shall be binding on the City until July 1, 1989, at which time the City Council may, following a duly-noticed public hearing, adjust these ratios per demographic data then available, except however, that no such adjustment shall allow a reduction in these 2.3 and 3.358 ratios by more than 10%. The equivalent dwelling unit permit maximum which will provide the method to predetermine, measure, and control population growth through the issuance of building permits, as illustrated on Exhibit A attached to this ordinance, shall be the Population Growth Guidelines of the City.

SECTION 6. During the first fiscal year of this PLAN (July 1, 1986 to June 30, 1987), available quarterly permits (as illustrated within Exhibit A), may be exceeded by no more than fifty (50) percent for each quarter of that year; during the second fiscal year (July 1, 1987 to June 30, 1988), available quarterly permits (as illustrated within Exhibit A) may be exceeded by no more than forty (40) percent for each quarter of that year; and during the third fiscal year (July 1, 1988 to June 30, 1989), available quarterly permits (as illustrated with Exhibit A) may be exceeded by no more than thirty (30) percent for each quarter within that year. All remaining permits shall be distributed equally over fiscal years four and five of this CONTROLLED-GROWTH LIMITATION PLAN.

SECTION 7. Senior, senior affordable and affordable residential developments for very-low to lower income households shall have preferential rights for allotment of

permits. Senior and senior affordable units shall have not less than twenty (20) percent and other affordable not less than fifteen (15) percent of each allocation period's available permits identified on Exhibit A and in accordance with the allocation system to be established per Section 10.

SECTION 8. Any available quarterly permits remaining unused shall be available in any subsequent quarter.

SECTION 9. The City shall review this CONTROLLED-GROWTH LIMITATION PLAN concurrent with the General Plan Update to be begun not later than June 1989 to evaluate the progress toward the projected population figure for 1991 (105,106). Based upon this review, the permit allocation procedure shall be revised to ensure that maximum population projections are not exceeded.

SECTION 10. Immediately following the effected date of this PLAN, the City shall adopt, after a duly-noticed public hearing, a system for allocating building permits to implement the requirements of this PLAN. Within ninety (90) days of the effective date of this PLAN, the allocation system shall be adopted by ordinance. The allocation system shall include criteria for the evaluation of projects, including but not limited to: Senior citizen housing; housing for very-low or lower income families; design excellence, including community-wide amenities; infill development; housing which provides a positive fiscal impact on City revenues; and the availability or provision for public facilities and services, including but not limited to, sewers, roads, water, storm drains and the like; or additional urgent housing needs determined by the City Council after public hearings. The allocation system shall also set criteria for

evaluating single-unit developments. In the interim, the permit over-allocation provisions in Section 6 hereof shall not be applicable and available permits shall be issued on a first-come, first-serve basis subject to the numerical limits in Exhibit A. If an allocation System has not been approved within the ninety (90) days following the effective date of this PLAN, no further building permits shall be issued until the allocation system is approved. The City Council shall adopt an urgency moratorium to implement this provision if necessary. The provisions of this PLAN shall apply to all residential planned developments, tentative tracts, and vesting tentative tracts, except the Wood Ranch Specific Plan, for which the provisions of The Wood Ranch Development Agreement shall prevail. The total number of permits remaining to be issued to The Wood Ranch under The Specific Plan shall be averaged over the term of the Development Agreement and subtracted annually from the total number of permits available for all residential development. Upon termination of the Development Agreement, unallocated permits related thereto shall be made available City-wide and shall be added to Exhibit A accordingly. In the event that a previously adopted ordinance on this subject mandated the establishment of an allocation system similar hereto, compliance with said previous ordinance shall constitute compliance with this section.

SECTION 11. Not later than July 1, 1991, the facts creating the need and necessity for this CONTROLLED-GROWTH LIMITATION PLAN shall be re-evaluated in concert with the latest revisions of the General Plan and the results of the 1990 United States Census. Future growth limitations for the next five-year portion of the CONTROLLED-GROWTH LIMITATION

PLAN shall be based on the need and necessity established by criteria enunciated in Section 4, the revised General Plan, and the City's 1996 Countywide Planning Program Population Guideline of 114,354.

SECTION 12. This CONTROLLED-GROWTH LIMITATION PLAN shall be in effect until July 1, 1996.

SECTION 13. THIS ORDINANCE SHALL NOT BE REPEALED OR AMENDED EXCEPT BY A VOTE OF THE PEOPLE. At the end of ten (10) years, this ordinance, as it may be recommended for amendment by 4/5 vote of the Council following duly-noticed public hearings, shall be placed on the ballot in order to allow its re-adoption by the People.

SECTION 14. If any section, subsection, sentence, clause, phrase, or portion of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and an independent provision and such decision shall not affect the validity of the remaining portion hereof. The City Council hereby declares that it would have passed this ordinance, and each section, subsection, sentence, clause and phrase hereof, irrespective of the fact that any one of the sections, subsections, sentences, clauses or phrases hereof be declared invalid or unconstitutional.

SECTION 15. The City Clerk shall cause this ordinance to be published at least once in a newspaper of general circulation, published and circulated in the City within fifteen days after its passage, in accordance with Section 36933 of the Government Code, shall certify to the adoption of this ordinance and shall cause the ordinance and his certification, together with proof of publication, to be filed in the Office of the Clerk of this City.

PASSES and ADOPTED this 21 day of July, 1986.

ATTEST

Myrna Katsch, Deputy City Clerk

ELTON GALLEGLY, MAYOR OF THE CITY
OF SIMI VALLEY, CALIFORNIA

APPROVED AS TO FORM:

John Torrance, City Attorney

APPROVED AS TO CONTENT:

M.L. Koester, City Manager

James R. Lightfoot, Acting Director Department of
Community Development

EXHIBIT A
CONTROLLED GROWTH LIMITATION PLAN

Quarter Beginning	* Permits Available After Adjustment	**Permits Including Over-allocation 50-40-30	Interpolated Countywide Planning Program Population
July 1, 1986	107	161	94,414.
October 1, 1986	107	161	
January 1, 1987	107	160	95,672.
April 1, 1987	107	160	
July 1, 1987	107	150	
October 1, 1987	107	150	
January 1, 1988	107	150	98,188.
April 1, 1988	107	149	
July 1, 1988	107	139	
October 1, 1988	107	139	
January 1, 1989	107	139	100,704.
April 1, 1989	107	139	
July 1, 1989	107	43	
October 1, 1989	107	43	
January 1, 1990	107	43	103,220.
April 1, 1990	107	43	
July 1, 1990	107	43	
October 1, 1990	107	43	
January 1, 1991	107	43	105,106.
April 1, 1991	107	42	
January 1, 1992	-		106,992.
January 1, 1993	-		108,878.
January 1, 1994	-		110,764.
January 1, 1995	-		112,650.
January 1, 1996	-		114,354.

* Historically Simi Valley has averaged 888 residential building permits per year since 1975. However, in 1985, an unusually high number of permits (2,328 equivalent dwelling unit permits) were issued due to low interest rates and other economic conditions. Since, under the Countrywide Planning Program policies adopted by the City Council, only 1,067 permits were available for the year, 1,267 were borrowed from future allocations. So far, in the first two quarters of 1986, 1,095 equivalent dwelling unit permits have been issued. Only 534 permits (half of 1,067) were available, therefore an additional 561 were borrowed from future allocations. The number of permits available for the next 5 years is 5,335 (1,067 X 5 = 5,335). Subtracting the borrowed permits (1,261 + 561 = 1,822) from this five year allocation (5,335 - 1,822 = 3,513) leaves 3,513 residential permits available for the period from July 1,

1986 to June 30, 1991 in order to stay within the maximum population under the Countywide Planning Program.

In addition, the Wood Ranch, per its Development Agreement has 2,952 permits remaining to be issued over the next 10.75 years. This number (2,952) was averaged over that time (approximately 274.6 permits per year) and the average numbers were subtracted from each year's number of available permits (per Section 10). Therefore, the base figure distributed over the first five years of the PLAN was: 3,513 - (274.6 X 5 = 1,373) = 2,140.

**Per Section 6 available quarterly permits may be exceeded by 50%, 40% and 30% during the first, second and third years, respectively, of the CONTROLLED-GROWTH LIMITATION PLAN.

I, Deputy City Clerk of the City of Simi Valley, California, do hereby certify that the foregoing Ordinance No. 638 was regularly introduced and adopted by the City Council of the City of Simi Valley, California, at a regular meeting thereof held on the 21 day of July, 1986, by the following vote of the City Council:

AYES: Council Members McAdoo, Rock, Mayor Pro Tem Stratton and Mayor Gallegly

NAYS: None

ABSENT: Council Member Howard

ABSTAINED: None

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of the City of Simi Valley, California, this 22nd day of July, 1986.

DEPUTY CITY CLERK OF THE
CITY OF SIMI VALLEY, CALIFORNIA

I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT COPY OF THE ORIGINAL

DATE July 20, 1989

Office of the City Clerk

Susan Massa

Deputy City Clerk

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11852 Santa Monica Boulevard, Suite 3, Los Angeles, California 90025; that on January 24, 1992, I served the within ***Brief Of Respondent City Of Simi Valley In Opposition To Petition For Writ Of Certiorari*** in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(Express Mail: original and forty copies)

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Berger & Norton
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Los Angeles, CA

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Virginia R. Pesola
Burke, Williams & Sorenson
611 West Sixth Street
Los Angeles, California 90017

The Honorable Steven Perren
Presiding Judge
Ventura County Superior Court
Hall of Justice
800 South Victoria Avenue
Ventura, California 93009

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Edward J. Connor, Jr.
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Second Appellate District
Division Six
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James L. McBride,
County Counsel
Dennis L. Slivinski, Ass't.
County Counsel
County of Ventura
800 South Victoria Avenue
Ventura, California 93009

The Honorable Bruce A. Thompson
Trial Court Judge
Ventura County Superior Court
800 South Victoria Avenue
Ventura, California 93009

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 24, 1992, at Los Angeles, California.

Betty J. Malloy
(Original signed)

No. 91-1076

JAN 29 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LONG BEACH EQUITIES, INC.,
Petitioner,
vs.
COUNTY OF VENTURA, CALIFORNIA, and
CITY OF SIMI VALLEY, CALIFORNIA,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION SIX

PETITIONER'S REPLY BRIEF

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No. 91-1076

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LONG BEACH EQUITIES, INC.,
Petitioner,
vs.
COUNTY OF VENTURA, CALIFORNIA, and CITY OF SIMI VALLEY, CALIFORNIA,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION SIX

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INTRODUCTION

The opposition briefs filed by the City of Simi Valley and the County of Ventura demonstrate the need for this Court's review. Although they succeeded in having LBE's case dismissed on the pleadings, thus precluding LBE from presenting any evidence to a trier of fact to determine what actually happened, both the City and the County briefs heavily stress the governmental version of the "facts" which occurred, as though there had been a trial and conflicting evidence had been weighed.[1]

But there has been no trial. There has been no full evidentiary presentation.[2] Under the rules applied by the California courts, there need not be. Disputed issues of the permitted and realistic uses of land, as well as the need for stringent governmental regulations, can be decided by the court — without evidence — as a matter of *law*. This is in stark contrast to other jurisdictions (the 9th Circuit Court of Appeals, for example [*McDougal v. County of Imperial* (9th Cir. 1991) 942 F.2d 668]) in which such issues can only be decided after trial, as questions of *fact*.

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[1] Many of the so-called "facts" asserted in both the City and County briefs are disputed by LBE and would be contested by evidence if the case were allowed to get beyond the pleading stage. Because the important issues before *this* Court are issues of law, LBE will not seek to correct every disputed "fact" raised by the government agencies. That factual dispute demonstrates the need for trial, but resolution of the facts should be done in a forum far removed from this one.

[2] In an exercise in judicial myopia, the California courts took limited judicial notice of selected phrases from selected documents, and gave those phrases conclusive weight, even though other official City and County documents contained contradictory information. No testimonial evidence was received.

The essential facts (as alleged in the complaint) are simply that LBE had worked long and hard with both the County and the City to develop plans which were acceptable to the regulators, received assurances from the regulators that the project was acceptable, and then — after the expenditure of millions of dollars in reliance — the regulators decided to preclude development. Moreover, the complaint alleges that there was no rational justification for preventing development of LBE's property. LBE had cooperated with both the County and the City in planning the development of the entire area of which its property was a small part, had contributed money toward the construction of oversized utilities through neighboring properties in order to service the expected development of its own property, and purchased the property only after being assured that its development concepts were compatible with those of the County and City. The County, the City and LBE had agreed on a time frame for development which was immediate. To effectuate that, the County removed agricultural restrictions from the property so that it could be residentially developed. The complaint alleges that there were adequate facilities to service the LBE development without burdening either the County or the City. Thus, refusal to permit development was irrational, arbitrary, and capricious. Those facts show sufficient interference to warrant trial.

Both the City and the County make much of the fact that LBE did not seek annexation into the City. Of course not. After the City stopped processing the plans which LBE had prepared at great effort and expense, imposed a moratorium on development, and then placed a stringent limitation on the number of new homes to be constructed each year, why would anyone seeking to develop property seek admission to such a jurisdiction? Annexation would have guaranteed sterility. Thus, when it became clear that development in the City could not

economically take place, LBE sought development permission from the County, which refused even to process the paperwork, even though it had the responsibility for the LBE property as a matter of state law.

LBE seeks only the chance to present its case to a trier of fact. The problem is the absence of coherent rules establishing the elements which need to be pled for a property owner to get its case before a fact finder for decision. The absence of coherent rules allows anarchy to prevail in the lower courts, with the results on the same facts varying widely from state to state depending on the predilections of the individual judges. That's no way to protect constitutional rights.

"*AD HOC*" DECISIONS REQUIRE FACTUAL ADJUDICATION BEFORE DECISION

This Court has repeatedly held that there is no set formula for determining when a regulatory taking has occurred, but each case must be examined, *ad hoc*, on its own facts to determine the impact of the challenged regulation. (E.g., *Penn Central Transp. Co. v. City of New York* [1978] 438 U.S. 104, 124; *Ruckelshaus v. Monsanto Co.* [1984] 467 U.S. 986, 1005.)

An *ad hoc* determination would seem to be a singularly inappropriate place to permit decision-making **without a full evidentiary hearing** and as a matter of law. Yet that is what the California courts do, as exemplified by this case.

In sharp contrast, the 9th Circuit Court of Appeals (the federal appeals court with jurisdiction over California) has repeatedly viewed regulatory taking cases as instances which require careful factual examination before decision. (E.g., *McDougal v. County of Imperial* [9th Cir. 1991] 942 F.2d 668, 680; *Hall v. City of Santa*

Barbara [9th Cir 1986] 813 F.2d 198, 201-202.)[3]

Rather than deal with this conflict in the law, the City and County merely recite what the California courts did below as though that application of one of the two conflicting viewpoints ends the matter. For example, the City headlined one of its sections as follows:

> "The State Courts examined the City and County regulations and found that they substantially advance legitimate state interests" (City opp., p. 8)

The County headlined one of its sections like this:

> "The County's guidelines for orderly development substantially advance a legitimate state interest and do not deny the economically viable use of Long Beach Equities' property" (County opp., p. 14)

LBE agrees that that is what the state courts did. The problem is that the state courts did it without trial and without evidence and without any ability to weigh the facts so that such determinations might properly be made.[4] Simply accepting, at face value and without

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[3] This sharp contrast between California and the 9th Circuit is reminiscent of the dispute which brought *Yee v. City of Escondido, cert. granted*, no. 90-1947 to this Court.

[4] This is no mere academic concern. The City, for example, repeatedly says that it has zoned the subject property for 325 homes and asserts that such zoning could never result in a taking. There is an old addage in the real estate business: "You can set the price if I can set the terms." The reason for that is that the terms (e.g., calling for payment spread over 100 years) are critically important. So, here, for the City to base its argument *solely* on the number of units theoretically available for the subject property — without regard to the *timing* of that development, which the City has rigidly circumscribed — provides *no* information from which to reach a conclusion as to whether a taking has occurred.

evidentiary examination, the City and County rationalizations for their actions, and concluding that no taking can occur because the actions were undertaken for "proper" purposes, is no more acceptable here than it is in *Lucas v. South Carolina Coastal Council, cert. granted*, no. 91-453.

By this type of sleight-of-hand, the government entities have borne out this Court's expressed concern about the ". . . cleverness and imagination . . ." of governmental word games which could result in the regulatory confiscation of private property (*Nollan v. California Coastal Commn.* (1978) 483 U.S. 825, 841).

Clear guidance from this Court is needed so that decisions based on the actual facts are rendered on constitutional issues.

IPSE DIXIT IS NO WAY TO DETERMINE CONSTITUTIONAL RIGHTS

Because of its need to defend the California system of deciding regulatory taking cases as a matter of law, without factual examination, the City is reduced to global pronouncements and *ipse dixit*.

For example, the City notes the state court assertions that the ordinances do not automatically preclude development and that, if LBE had its property annexed to the City "it could explore other possibilities . . ." (City opp., p. 10) Please note that these assertions do not relate to the way in which the ordinances have been applied so as to preclude economically viable development of the LBE property.

From these assertions, the City leaps to the unsupported conclusion that "Interesting questions as to the precise meaning of 'reasonable investment back[ed]

expectations,' 'economically viable use' or 'ripeness' are not justiciable in this case." (City opp., p. 10)

Really? Why not? It seems to LBE that one cannot properly conclude that either the ordinance does not preclude development or that annexation into the City might afford relief without determining what LBE's expectations were, what uses are permitted of the property by the City and whether they are economically viable, as well as what steps have already been taken (and what non-futile ones remain) to ripen the case.

Thus, the discussion at page 10 of the City's brief accurately pinpoints much of the dispute before this Court: the City believes that its actions ought to be rubber-stamped "approved" without examination of their impacts or consequences, while LBE believes that this Court meant it's repeatedly expressed concern for economic viability, investment-backed expectations, and protection of the rights of heavily regulated property owners.

How to effectuate this Court's intended protections is subject to such diverse treatment in the lower courts that further guidance is needed now from this Court to end the anarchic conditions prevailing. Further delay will result only in more chaos, not resolution.

SUBSTANTIVE DUE PROCESS IS NOT A WORD GAME

The City's approach to substantive due process appears to be that if any rationale can be conjured for its actions, then its actions are valid. (City opp., p. 15)

That comports neither with the cases discussed in LBE's petition nor with this Court's interest in the issue as exemplified by *PFZ Properties, Inc. v. Rodriguez, cert. granted*, no. 91-122.

LBE challenged the rationale for the City's restriction of development of its property because, as part of its extensive dealings with both the City and the County to develop its property in a manner which was both sensitive and responsive to the city/county needs, LBE had arranged for the construction of infrastructure and utilities through neighboring projects which were adequate to service the LBE property without placing any burden on City or County facilities.

Thus, a hearing was needed to determine the validity of the City's assertions that it needed to choke off development to provide for the provision of adequate services and to account for traffic and air quality.

The City, however, doesn't want to subject its actions to scrutiny. Small wonder. The City has no defense, other than the procedural defense provided by the California courts when they accepted the City's assertions at face value and refused to examine their underpinnings.

THE IDEA OF "REASONABLE, INVESTMENT-BACKED EXPECTATIONS" FOUND IN THE CITY AND COUNTY BRIEFS ROBS THE CONCEPT OF ANY MEANING

The multiple reliances by this Court on the concept of reasonable, investment-backed expectations have been discussed in the Petition. As noted there, both this Court's repeated explications and its reference to the right of a property owner to be able to attempt to achieve a profit, or reasonable return, on its investment show that the concept is an important element of takings law.

The City and County dispute that. They would relegate the concept to the old, state law concept of "vested rights." (County opp., pp. 21-26; City opp., p. 21)

There are at least two responses.

First, had this Court intended to say "vested rights," it could have done so. In any or all of the cases decided during the last decade and a half. It did not. Presumably, that was because the baggage carried by the old "vested rights" concept was not what this Court had in mind.

Second, the two concepts are not equivalent. The concept of examining a property owner's expectations did not appear in any land use cases (state or federal) until this Court's 1978 decision in *Penn Central.* The expectations concept in takings law is based on the property owner's reasonable beliefs and actions. The 9th Circuit Court of Appeals recently contrasted the two ideas:

> "In contrast to a taking or deprivation claim, the gravamen of a 'vested rights' claim is that the landowner has a right to a particular use of his land because he has relied to his detriment on a formal government promise (in the form of a permit) stating that he can develop that use. The claim is thus a species of governmental estoppel. A claim of estoppel against the government rests not on Constitutional norms of fairness but on broader norms of equity." (*Lakeview Dev. Corp. v. City of South Lake Tahoe* [9th Cir. 1990] 915 F.2d 1290, 1295 [citation omitted])

Thus, by the clever prestidigitation of equating LBE's expectations claim to a "vested rights" claim (when no vested rights claim was presented below) the City and County have evaded the issue in a manner which eliminates protection this Court insisted on creating.

Whether this Court's expectations concept is to be equated to the older vested rights concept, as the

California courts did below, is a matter of serious moment, warranting this Court's attention before the virus spreads further.

"RIPENESS" SHOULD NOT BE A GAME EITHER

The City's suggestion that "[r]ipeness is not a game . . ." (City opp., p. 12) is a proper desideratum. Sadly, reality doesn't come close. In land use cases, the concept of ripeness has been utilized by government agencies and numerous lower courts as a routine tool to shunt property owners out of court.

Property owners, attempting to abide by what the rules seem to be at any given moment, thus run the risk of either filing suit too early (as the courts below said occurred here) or, by seeking to "ripen" a dispute, too late (e.g., *National Advertising Co. v. City of Raleigh* [4th Cir. 1991] 947 F.2d 1158 [holding land use ordinance caused injury immediately upon passage and suit filed after later application of ordinance was untimely]).

In fields of the law other than land use, this Court has had no trouble in finding ripeness without forcing plaintiffs to jump through the kind of constantly changing hoops provided in land use cases. (See cases discussed at pp. 24 and 28 of the Petition and not mentioned by either the City or the County.)

If this Court is as interested in the protection of the rights of property owners as its recent decisions indicate, then a rational method of allowing litigation of their disputes with land use regulators seems mandatory. What exists now is local option anarchy, with lower courts able to find cases supporting virtually any result desired.

CONCLUSION

The City and County briefs attempt to cloud the serious legal issues at bench in a blizzard of "factual" assertions. They are in the wrong court. If they want to make factual arguments, the place to do that is at trial. The procedural avenue they consciously chose was a decison based on the allegations of the complaint.

The fundamental problem in regulatory taking cases, which remains even after the numerous decisions this Court has rendered recently, is how to get a case tried on its merits. To date, many lower courts are accepting the tortured arguements of entities like the City and County at bench, and inventing ever more clever ruses to preclude factual adjudication.

Because LBE believes that this Court intends for the Fifth Amendment to provide protection to property owners, LBE prays that certiorari be granted.

Respectfully submitted,

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Supreme Court, U.S.
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Petition for Writ of Certiorari to the California Court of Appeal, Second Appellate District, Division Six

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITIONER, LONG BEACH EQUITIES, INC.

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITIONER, LONG BEACH EQUITIES, INC.

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of petitioner, Long Beach Equities, Inc. Written consent to the filing of this brief has been granted by counsel for all parties. Copies have been lodged with the Clerk of the Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose

of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board has authorized PLF participation in this case.

Amicus seeks here to augment the argument in the petition for writ of certiorari. It is believed that PLF's public policy perspective and litigation experience in support of private property rights will provide an additional viewpoint with respect to the constitutional issues presented. PLF has participated in numerous cases involving issues arising under the Takings Clause of the Fifth and Fourteenth Amendments to the United States Constitution. Its attorneys were counsel of record in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF participated as amicus curiae in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

Amicus believes that the present case provides an excellent opportunity for this Court to provide some needed answers on the question of when land use regulation goes so far as to result in a taking. This case demonstrates particularly egregious conduct by local officials. And, in the future, such conduct can be assured in California if the views of the California Court of Appeal are allowed to stand. The opinion below not only seriously erodes the constitutional concept of property rights, but it

also drastically departs from the direction and reasoning employed by this Court in prior cases interpreting the Takings Clause.

STATEMENT OF THE CASE

This case involves a 180 degree turnabout in official actions regarding the residential development of a 250 acre parcel of property in Ventura County, California. Despite huge expenditures, including infrastructure costs incurred in reliance on official assurances, development of the property has been rendered economically infeasible by a series of regulatory actions undertaken by the local public agencies.

REASONS FOR GRANTING WRIT

Although this Court's willingness to now address takings issues in other factual settings is most welcome, there is continuing great need for this Court to consider the takings implications of zoning and other regulatory actions designed to alter residential development densities, or to downzone against residential development, in order to achieve land conservation or no-growth objectives. A major question presented is: How far can governmental officials go in depriving a property owner of values predicated on official assurances after these officials change their minds and decide that open space and growth control objectives should be emphasized?

For example, where, based on development assurances of officials, infrastructure is developed to support the construction of a large number of homes on a parcel of land, can government officials then decide that they want to preserve the property for open space and thereby change the zoning to reflect the latter use? Also—can government officials achieve this objective indirectly by a series of moratoria restrictions, or by the employment of other mechanisms, the practical effect of which is to make any development of the property economically infeasible? And if government cannot safely do these things, can it achieve the same result by downzoning actions which allow only some very limited use of the property—such as the development of one home on many acres of property?

This Court's views on such issues are urgently needed. The location of development needed to provide affordable housing stock, and the capital formation necessary thereto, may depend considerably on this Court's view. At present there is chaos. Both government officials and developers of housing stock are in the dark about what can be done. Takings law is interpreted differently in different jurisdictions and this only makes the real word problems of providing needed housing all the more difficult and uncertain.

The building industry in the State of California has to be gravely concerned with what it reads in the decision by the California Court of Appeal below. Those investing their time, moneys, and energies in the development of housing stock are now in effect being told that dealing with local officials is like swimming in a shark tank—

there are no constitutional protections and one had better be prepared to be eaten alive at any time.

The development of case law such as that below necessarily affects this nation's ability to provide needed affordable housing stock. And the uncertainties inherent in the present situation can only drive up the price of housing making it far less affordable for those who need it.

The present case provides this Court an excellent vehicle for addressing issues which cry out for some sensible resolution. This Court has never adopted a "shark tank" approach to its interpretation of the Takings Clause and it is in the public interest that this Court now speak to the issues.

SUMMARY OF ARGUMENT

While amicus agrees wholeheartedly with the petitioner's plea for this Court to clarify matters by further development of the law regarding regulatory takings, there is, at the same time, an equally great need for the Court to at least address the misuse of what it has already said. The opinion below well-illustrates such misuse.

The court below commenced its discussion of takings law with the following statement:

> "To state a cause of action for inverse condemnation, LBE *must* plead facts which show either that: (1) the application of the general zoning laws to its property does not substantially advance a legitimate state interest; or

(2) such laws deprive it of substantially all economically viable use of its lands." Petition, Appendix C at 10 (emphasis added).

As will be shown, in so doing, the court below has taken two bright-line tests which always yield a takings result where the required showing is made and has converted them to a rule which says that a taking never results if government actions survive these tests.

In pursuing such an unwarranted approach, the court below overlooks the fact that this Court's interpretation of the Takings Clause has been based on much broader considerations. This Court has uniformly analyzed takings issues in light of the overall purpose of the Fifth Amendment's Takings Clause which "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The analysis by the court below is further exacerbated by that court's willingness to presume that government regulations are well-motivated and will serve their avowed purpose. By engaging in such deference to local regulatory actions, the court below not only side-steps the kind of examination required by this Court in *Nollan v. California Coastal Commission*, 483 U.S. at 834 n.3, but it reduces the takings issue to a question of whether the landowner has been deprived of substantially all economically viable use of his land. Thus the court below reasons that "it is constitutional to restrict the use of one's land" simply because "the public benefits greatly." Petition, Appendix C at 10. The court goes on to say that

in some cases, "no compensation may be required even if almost all uses are taken." *Id.*

With this basic approach to the problem, the court below was then quick to conclude that the takings issue was not ripe because it found, as a matter of law, that the regulatory devices employed did not necessarily result in any such land use devastation. This was done without permitting petitioner to factually establish that any further attempts to obtain approvals to put the property to some productive and economically feasible use would have been outright rejected and hopelessly futile. The mechanical approach taken by the court below has stretched this Court's ripeness requirement far beyond its intended purpose.

Lastly, although the court below recognized this Court's prior pronouncements regarding "frustration of reasonable investment-backed expectations" (*e.g., Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Ruckelshaus v. Monsanto Company*, 467 U.S. 986 (1984); and *Penn Central Transportation Corp. v. City of New York*, 438 U.S. 104 (1978)), the court nevertheless stripped this federal takings issue of all vitality by concluding that property owners, in California, can never have a reasonable expectation of developing their property until they have satisfied California's harsh "vested rights" rule. As the court below pointed out, such a vested right does not accrue until one obtains a final building permit. Under this view, government officials can lead property owners down the garden path, all along assuring them that the passageway is perfectly safe, and can then abruptly push them over the brink of a cliff unless they have reached safety at the path's end.

As will be shown, California's vested rights rule has nothing whatever to do with this Court's pronouncements on the subject of reasonable investment-backed expectations.

ARGUMENT

I

THE COURT BELOW HOPELESSLY CONFUSED THIS COURT'S TAKINGS DOCTRINE

As this Court's prior decisions demonstrate, it is no answer to say that government pursues some legitimate interest. *See, e.g., First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. at 314-15 (Fifth Amendment is not designed to limit government interference but rather to secure compensation "in the event of otherwise proper interference"); *see also McDougal v. County of Imperial,* 942 F.2d 668, 676-77 (9th Cir. 1991) (legitimate public interest is not a trump card).

Usually government actions do pursue some legitimate government interest. But a question can still remain as to whether the legitimate pursuit of government goals nevertheless results in a taking requiring compensation. Under *Nollan,* a taking will assuredly occur if a regulation does not substantially advance legitimate government interests—but this does not mean that a taking will not occur if it does. There are still other factors to be considered under this Court's takings doctrine.

The purpose of the Takings Clause has always been to protect and secure the rights of the individual against

the government.[1] *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166, 177 (1872).

In 1922, this Court held that regulatory conduct can be challenged as a taking under the Takings Clause. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). The Court there explained:

> "The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415.

While the Court spoke of the Fifth Amendment's Takings Clause as a "seemingly absolute protection," the Court nevertheless recognized that it was qualified by "the police power." *Id.* Given this qualification, the Court also observed that "the natural tendency of human nature is to extend the qualification more and more until at last private property disappears." *Id.*

This case demonstrates the accuracy of the Court's observation.

Although this Court has in more recent time referred to its *Pennsylvania Coal* regulatory takings analysis as "established doctrine" (*First Church*, 482 U.S. at 316), this Court has also recognized that the question of what constitutes a regulatory taking "has proved to be a problem of considerable difficulty." *Penn Central*, 438 U.S. at 123.

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[1] The Fifth Amendment applies to the state through the Fourteenth Amendment. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980).

What has always been clear, however, is that the takings issue is to be considered in light of the guiding principle that the Fifth Amendment's Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. at 48.

In *First Church*, this Court referred to this principle as "axiomatic." 482 U.S. at 318.

In *Penn Central*, the Court said that it had been "unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." 438 U.S. at 124.

The Court, in *Penn Central*, nevertheless "identified several factors that have particular significance." *Id.* The Court specifically pointed to:

1. "the character of the governmental action,"

2. the "economic impact of the regulation," and

3. "the extent to which the regulation has interfered with distinct investment-backed expectations." *Id.*

These factors have never been held to be exclusive. They are merely means for analyzing the question of whether, in a given factual situation, the regulation goes too far. In other words, such factors assist in determining whether the regulation is, in reality, an attempt to load

"upon one individual more than his just share of the burdens of government." *See Keystone*, 480 U.S. at 512 (Rehnquist, C.J., dissenting) (citing *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893)).

As stated in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980):

> "The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest."

This Court's application of the *Penn Central* factors shows that if the force of any one is sufficiently strong, it alone will dispose of the takings question. *Monsanto*, 467 U.S. at 1005 (force of reasonable investment-backed expectation factor "so overwhelming" as to dispose of the taking question).

As a consequence of this Court's approach in resolving takings issues, two bright-line tests have evolved from the generalized considerations spelled out in *Penn Central* which weigh so heavily in favor of a takings conclusion that when either one occurs, it must be said that the regulation goes "too far" and that "fairness and justice" require the finding of a taking.

The first is where the character of the governmental action is such that it fails to substantially advance a legitimate government interest. *Nollan* illustrates this bright-line test and a taking was found despite the fact the property owners were left with reasonable use of their property. Indeed, the California court in *Nollan* had stressed this remaining use as a basis for its no taking

conclusion. This treatment of the case by the lower court was expressly acknowledged by this Court in its opinion.[2]

The second bright-line test recognizes a taking wherever the economic impact of the government regulation actually is so severe as to deny an owner economically viable use of the property. *Hodel v. Irving*, 481 U.S. 704, illustrates this test. There the regulation amounted "to virtually the abrogation of the right to pass on a certain type of property . . . to one's heirs." *Id.* at 716.

In *Agins*, this Court made it clear that either finding alone would result in a taking. The Court summarized the rule in the disjunctive as follows:

> "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land." *Agins*, 447 U.S. at 260.

Of course, it follows that even though government regulation may survive these bright-line tests, this does not end the inquiry. The character of the government action is still relevant. So also is the regulation's economic impact on the property. And, as noted above, this Court has given particular attention to interference with reasonable investment-backed expectations. *Kaiser Aetna v. United States*, 444 U.S. 164; *Ruckelshaus v.*

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[2] "It [the California court] ruled that the Nollans' taking claim also failed because, although the condition diminished the value of the Nollans' lot, it did not deprive them of all reasonable use of their property." *Nollan*, 482 U.S. at 830.

Monsanto Company, 467 U.S. 986; and *Penn Central Transportation Corp. v. City of New York*, 438 U.S. 104.

Obviously, the lower court's analysis is confused and it is precisely this kind of confusion which should be addressed by this Court.

II

CALIFORNIA'S HARSH VESTED RIGHTS RULE CANNOT BE GRAFTED ON TO THIS COURT'S REASONABLE EXPECTATION RULE

Although the court below gives lip service to this Court's reasonable investment-backed expectation rule, it holds that this theory cannot be pursued unless the property owner has acquired a "vested right" to proceed with the final phase of construction under California law. The court below has thus grafted on to this Court's analysis an additional requirement that the vesting rules adopted by the California Supreme Court in *Avco Community Developers, Inc. v. South Coast Regional Commission*, 17 Cal. 3d 785 (1976), be first satisfied. But, as the court below recognized, that case not only requires substantial expenditures but also requires that one obtain a final building permit.

California's vested rights doctrine is grounded on the principle of equitable estoppel, *not* on the Fifth Amendment's Takings Clause. To say that one cannot have a reasonable investment-backed expectation until the California doctrine is met is the equivalent of throwing out the federal rule in its entirety. Frustration of expectations becomes moot when one has a permit in hand. This Court

has never hinted that its rule is limited to the kind of proofs required by the court below. Indeed, as this Court pointed out in *Kaiser Aetna*, although the actions of individual officials representing a governmental agency may not "estop" the government from pursuing its action, such conduct "can lead to the fruition of a number of expectancies embodied in the concept of 'property.' " *Id.* at 179.

III

THE OPINION BELOW REFLECTS THE NATIONAL CONFUSION OVER THIS COURT'S RIPENESS REQUIREMENTS

This amicus strongly endorses petitioner's views regarding the need to address the hopeless confusion that has resulted from this Court's ripeness requirements and, in particular, its decisions in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), and *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986).

What was intended as a rule of practical application, designed to ensure that a claim is not premature, has resulted in a bureaucratic nightmare involving tactics regularly employed to "defense" all takings claims as not ripe. As a consequence, regulatory victims are being deprived of any effective judicial remedy. The opinion below well illustrates the problem and affords this Court an excellent opportunity to address it.

The court below relied heavily on this Court's statement in *MacDonald, Sommer*:

> "A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." 477 U.S. at 348.

The court below reasoned:

> "Denial of approvals for a particular and relatively intensive residential development, as here, cannot be equated with a refusal to permit any beneficial use whatsoever." Petition, Appendix C at 17.

But here, the case pleaded is that final decisions have been made. Although opportunity may always exist to file further applications, where the facts alleged show an absolute unwillingness to consider such applications, and where it is known that they will not be processed, finality is achieved.

It is submitted that this Court never intended its ripeness requirements, designed to protect against premature claims, to be used as a device for requiring futile actions.

But even if it were otherwise, this Court's ripeness rules still cannot be extended to the present type of case for yet other reasons. The rule cannot logically be applied in any case:

1. where takings factors other than impact on use are involved (such as failure to substantially advance legitimate government interests or frustration of reasonable investment-backed expectations) and the property owner seeks to show that these factors are sufficient to prove a takings claim regardless of remaining uses, or

2. where the property owner seeks to show that no lesser use, even if approved, would be economically feasible.

In the first situation, a taking can result despite remaining economic uses. And where the required proof is made, knowing the degree of economic impairment is unnecessary. For example, where a plaintiff can sufficiently demonstrate interference with reasonable investment-backed expectations, a taking will be shown. And this result will follow even absent, as stated by the court below, "a refusal to permit any beneficial use whatsoever." The reasonable expectation rule would be rendered sheer surplusage if in every case a property owner had to show denial of all economically viable use. As noted, this Court in *Monsanto*, 467 U.S. 986, found the reasonable expectation factor to be "overwhelming" (*id.* at 1005) and remaining usefulness to Monsanto "irrelevant" (*id.* at 1012).

Likewise, deprivation of use is not an essential ingredient where, as here, it is claimed that regulatory action fails to substantially advance a legitimate government interest. Such proof, by itself, can support a taking conclusion regardless of economic impact. *Nollan*, 483 U.S. 825, is a good example. As *Nollan* demonstrates--one need not know what beneficial uses remain where it is not necessary to know what beneficial uses remain in order to find a taking.

In the second situation set forth above, it is only reasonable to allow a property owner to show that, even if applications for lesser uses could be pursued, and even

if such uses might be allowed, such uses would be economically infeasible. Surely, this Court, in its earlier ripeness cases, did not intend to impose a requirement that applications be processed for uses which cannot economically be pursued.

In short, ripeness requirements should not be mechanically imposed in situations where they serve no purpose. They are inappropriate in any case where a property owner is seeking to pursue factually a claim that his constitutional rights have been invaded regardless of whether other uses might be allowed. Accordingly, the *MacDonald, Sommer* finality ripeness requirement should be limited to cases where a property owner's claim is dependent on proving deprivation of use and it is necessary to know whether other uses may be allowed in order to decide the case.

It also follows that where, as here, one seeks to show factually that regulatory action does not substantially advance legitimate public interests, or that reasonable investment-backed expectations have been frustrated, such matters cannot be resolved as a matter of law. Even in a due process setting, the question of whether regulatory actions legitimately pursue governmental goals can involve factual questions which require a fact-finding type judicial inquiry. *See, e.g., Nectow v. City of Cambridge,* 277 U.S. 185 (1928).

CONCLUSION

For the reasons stated above, amicus respectfully requests that this Court grant the petition for certiorari.

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Respectfully submitted,

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